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In The United States Court of Appeals For The First Circuit

No. 5125

W. H. Elliott & Sons Co., Inc.,
Plaintiff, Appellant,
v.
Nuodex Products Co., Inc.,
Defendant, Appellee;

No. 5136

E. & F. King & Co., Incorporated
Cross-claimant, appellant,
v.
Nuodex Products Co., Inc.
Cross-defendant, appellee.

On Appeal From The United States District Court For The District of New Hampshire

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Consolidated Record Appendix To Brief of Defendant Appellee (Case 5125) And Cross-Defendant Appellee (Case 5136)

Submitted by,

SULLOWAY JONES HOLLIS & GODFREY
Attorneys for Appellee

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For The First Circuit

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MOTION OF E. & F. KING INCORPORATED TO DISMISS

Now comes E. & F. King & Co., Incorporated, a defendant in the above-entitled complaint, and moves that the action be dismissed or in lieu thereof that the return of service or summons be quashed on the grounds that the defendant is a corporation organized under the laws of the Commonwealth of Massachusetts, is not doing business in said District of New Hampshire, and was not and is not subject to service of process within said District.

PLAINTIFF'S MOTION TO TAKE DEPOSITIONS

And now comes the plaintiff W. H. Elliot & Sons Co., Inc., by its attorney, and moves the Court as follows:

1. For an order, pursuant to Rule 26 of the Federal Rules of Civil Procedure, granting plaintiff leave to take the oral depositions of Charles J. Gotthardt, Vice President of the defendant E. & F. King & Co.; Henry Draper, New Hampshire representative of the defendant E. & F. King & Co.; and the principal officer or clerk of the defendant E. & F. King & Co. (whose name is to the plaintiff unknown) having knowledge of the facts, files, writings, books, papers, and documents of the said defendant pertaining to transactions between said E. & F. King & Co. on the one hand and the defendant Nuodex Products Co., Inc. and persons in the District of New Hampshire, including the plaintiff on the other hand; and, *further*, to take the oral depositions of Arthur Minich, Executive Vice President and General Manager of the defendant Nuodex Products Co., Inc.; Herbert M. Johnson, New Hampshire representative of the defendant Nuodex Products Co., Inc.; and the principal officer or clerk of D. H. Litter Co., Inc. of 60 Cambridge Street, Boston, Mass., and the principal officer or clerk of the defendant Nuodex Products Co., Inc. (whose names are to the plaintiff unknown) having knowledge of the facts, files, writings, books, papers, and documents of the said D. H. Litter Co., Inc., and the said defendant Nuodex pertaining to transactions between either the defendant Nuodex or D. H. Litter Co., Inc., in behalf of the defendant Nuodex, and persons in the District of New Hampshire, including the plaintiff

and dealings between the defendant E. & F. King & Co. and either the defendant Nuodex Products Co., Inc. or D. H. Litter Co., Inc. on behalf of the said defendant Nuodex.

The depositions are for use at the hearing of defendants' pending motions to dismiss the complaint or to quash the service of the summons herein and the plaintiff is informed and believes that the deponents have knowledge of facts which will disclose that the defendant Nuodex by its contractual relations with the defendant King is jointly responsible with King for the injury caused to the plaintiff, and that both the defendant E. & F. King & Co., Inc. and the defendant Nuodex Products Co., Inc. are foreign corporations doing business within the State and District of New Hampshire, and the service of summons was valid, proof of which plaintiff cannot otherwise obtain.

HEARING ON MOTIONS
February 28, 1955

(Captions Omitted)

The Clerk: Hearing in Civil No. 1465, W. H. Elliott & Sons Co., Inc., vs. E. & F. King & Co., Inc., and Nuodex Products Co., Inc. For the plaintiff, McLane, Carleton, Graf, Greene & Brown, represented by Stanley M. Brown. For the defendant, E. & F. King & Co., Inc., represented by Robert W. Upton, and for Nuodex, Sulloway, Jones, Hollis & Godfrey, by Irving H. Soden, Esq., and Joseph S. Ransmeier.

Hearing on defendant E. & F. King's motion to dismiss and on Nuodex motion to dismiss and on King's motion for extension of time to file answer and on plaintiff's motion for leave to take oral deposition.

The Court: Well, we will take up the motion on the list first, plaintiff's motion to take oral depositions under Rule 26. That is Mr. Brown.

* * * * * * * *

Mr. Brown: The problem we have presently is that upon the complaints being filed, and they were filed through the Secretary of State on the basis that these two foreign corporations were doing business here in the District of New Hampshire but not

registered, upon the complaints being served, both defendants have filed motions to dismiss for lack of jurisdiction over the person. In order for us to protect the plaintiff, we feel that before the Court hears the factual evidence on the question of jurisdiction, the plaintiffs should be permitted to take oral depositions to develop what are the actual facts as shown by the internal sales records of the two companies with respect to their business in New Hampshire.

* * * * * * * *

The Court: Well, going along on that motion, who opposes that? Do you, Mr. Soden?

Mr. Soden: Well, we don't have any particular opposition to the motion to take depositions except in sense.

The Court: You appear for who, please?

Mr. Soden: I appear for Nuodex. We don't have any particular objection to the motion to take depositions, except to this extent, that we of course have filed a motion to dismiss on more than one ground here. One of our grounds is that the complaint fails to state a cause of action. Now, if that motion was to be heard by the Court, brother Ransmeier is prepared to argue it today if the Court wants to hear it today.

The Court: Isn't it on for hearing?

Mr. Soden: It is on for hearing, except I don't know if the other parties are prepared to argue it today in view of what has been said about depositions. If that motion were to be granted, then of course we would be wasting a lot of time and spending a lot of money taking depositions.

* * * * * * * *

The Court: Well, now, the next matter. I will take that under advisement. The next matter is that of King Company's motion for extension of time to file answer and motion to dismiss.

* * * * * * * *

The Court: Well, were you going to present some evidence under your motion?

Mr. Upton: No, because the plaintiff has stated that depositions had to be taken bearing upon this issue. We assume all parties expect these motions to dismiss will be postponed until

the completion of preparation, including taking of depositions by the plaintiff.

The Court: Is that your position, Mr. Soden, too? Are you equally indifferent about it, that the motion to dismiss should be deferred? I think it might well be.

Mr. Soden: On the issue of whether or not we are properly before the Court. As far as the other phase of it goes, we are prepared to argue it if the plaintiff is today, whether or not any cause of action is stated.

Mr. Brown: I am prepared to argue that if my brother wants me to.

The Court: Well, motions have been filed by Nuodex.

Mr. Soden: Yes.

The Court: And also King Company.

Mr. Soden: That is true. I don't think that King — I'm not sure, I haven't read their motion—I don't think they move to dismiss for failure to state a cause of action. Perhaps they did. Both sides are interested in whether or not companies are doing business here so as to be subject to service of process.

The other phase of our motion, if it were granted, would do away with the necessity of taking these depositions, of course. If the Court wants to hear it today, and everybody's ready, why, we are.

The Court: Well, your motion to dismiss is grounded upon the same reasons that are offered in the King Company case, matter of not being subject to service of process here, isn't that it?

Mr. Soden: That is true in part.

The Court: What is the other part?

Mr. Soden: The other part is it is in the nature of demurrer as we say in the state court. It fails to state a cause of action.

The Court: Well, it makes it a little difficult to determine what course should be followed here. If your motion is successful, then of course there is no occasion at all to take depositions of Nuodex Company, is that right?

Mr. Soden: That is true.

* * * * * * * *

Mr. Soden: * * * I suppose they want to develop facts on

the deposition. They have the burden of proof in this issue to show there is just jurisdiction. That is apparently why they want to get the facts. We don't have to go through that if the complaint doesn't state a cause of action. I think that ought to be passed on before taking depositions. And the expense —

The Court: How do you feel about that, Mr. Upton?

Mr. Upton: Well, I understand these are separate actions, and I don't know if we have the right to be heard on matters of Nuodex Company.

The Court: Do you wish to have your motion to dismiss heard at the same time?

Mr. Upton: Our motion to dismiss on want of jurisdiction, I would suppose, would be heard at the same time as their motion to dismiss on the like ground. Now they also go to the question of whether — their motion also goes to the question of whether the complaint states a cause of action as against them.

The Court: You have two common grounds for dismissal.

Mr. Upton: Yes.

The Court: I will consider that now if you want to go ahead with your motion, Mr. Ransmeier.

* * * * * * * *

Mr. Ransmeier: If it please the Court, we would like to reserve the right to submit a memorandum of law on this problem, on both aspects of this motion.

The Court: Get it in by Friday.

Mr. Ransmeier: Yes, sir.

Now I have been talking about our motion to dismiss for failure to state a cause of action, and on two grounds. We have not discussed the ground or alternative ground of failure to dismiss for want of jurisdiction of the defendant, and if you want us to proceed on that or wait for the other side to present that argument or wait for the —

The Court: I think you can discuss your full motion. I would think that would call for some evidence, wouldn't it?

Mr. Soden: Yes.

Mr. Ransmeier: All right, may it please the Court.

Mr. Soden: We haven't any evidence to submit, and I take it

the plaintiff hasn't, either. I don't know if we are prepared to do much on that phase of it.

The Court: Now or later?

Mr. Soden: It is our understanding, if the Court please, that the burden of proof is on the plaintiff, where we filed a motion to dismiss for want of jurisdiction, and the plaintiff isn't ready to go forward with that burden until he takes depositions. So that on that phase of it, we had all agreed among ourselves, if it is all right with the Court, that there wouldn't be any evidence on that today. It turns on the deposition.

* * * * * * * *

The Court: * * * The only pending issue before me at the moment is whether the complaint states a cause or a claim upon which relief can be granted. The second part of the motion, that is, whether or not there is any jurisdiction, is deferred and not heard. The same runs in the same channel as yours does. We will hold that over.

Mr. Upton: I think we are in agreement here as to the situation of the matter.

* * * * * * * *

Mr. Brown: May I ask one consideration of the Court. I would like to get the depositions out of the way and get the rest of the motions to dismiss, brother Upton's motion to dismiss, before the Court as soon as it conveniently can be done, mainly for the reason there are other claims existing. I don't want to have this one end being tried last when insurance monies are paid up to other claimants. I wonder, under due disposition of the motion, if you would give us reasonable time to get them taken and be back in here ready to go ahead on the defendant's respective motions to dismiss for lack of jurisdiction.

The Court: I still think the defendant's motion here, Nuodex's motion, should be disposed of first, shouldn't it?

Mr. Brown: I am assuming perhaps —

The Court: If you are not properly in here, there is no point in taking depositions.

Mr. Brown: I will agree that that is so.

The Court: That is the only amendment I suggest about it. You understand that?

Mr. Sodon: Well, it is my understanding that the Court will pass on our motion to dismiss for failure to state any cause of action before depositions are taken.

The Court: I would think so. I think that would be the order of business

* * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NUODEX PRODUCTS CO., INC'S MOTION TO DISMISS THE COMPLAINT AS TO IT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

INTRODUCTORY

1. Defendant Nuodex Products Co., Inc. has moved to dismiss the above-captioned action as to it on two grounds; first, failure of the complaint to state a claim upon which relief can be given, and second, lack of proper service of process and want of jurisdiction in this court. The present memorandum presents the law with respect to the first of the foregoing two grounds of its motion. In presenting it Defendant Nuodex Products Co., Inc. reserves its rights under the jurisdictional objection stated in its motion.

* * * * * * * *

TRANSCRIPT OF RECORD OF HEARING ON QUESTION OF JURISDICTION

BEFORE: The Honorable A. J. Connor, U. S. District Judge.

* * * * *

The Clerk: Hearing in Civil No. 1465, W. H. Elliott & Sons, Co., Inc., vs. E. & F. King & Co., Inc., and Nuodex Products Co., Inc.

For the plaintiff, Stanley M. Brown. For the defendant Nuodex, Frank J. Sulloway and Joseph Ransmeier. For the defendant King, John H. Sanders and Robert W. Upton.

Hearing on question of jurisdiction.

* * * * * *

Mr. Brown: Mr. Minich.

* * * * * *

Direct Examination

(Questions by Mr. Brown)

Q. Would you state your full name for the record?

A. Arthur Minich.

Q. And you live where, sir? A. Mountain Side, New Jersey.

Q. And what is your occupation?

A. President of Nuodex Products Company, Inc.

* * * * * *

Q. And how large a concern is Nuodex in terms of employees?

A. Approximately two hundred, domestically.

Q. And you also have subsidiaries operating in foreign countries and in Canada? A. That is so.

Q. And those operations are not included in the two hundred employee figure you just gave?

A. That is so.

Q. Where are your facilities located, sir?

A. In Newark, New Jersey, in Elizabeth, New Jersey, and in Long Beach, California.

Q. And those three locations are manufacturing installations, are they? A. That is so.

Q. What, in a generic description, is the type of product that Nuodex makes and sells? A. Specially purpose chemicals, including products which are used by the paint and varnish industry, the textile industry, the petroleum industry and chemical industry at large.

Q. Is it fair to say that the great bulk of your business is directed toward the industrial customers?

A. That is so.

Q. You have relatively little contact with the retail trade directly? A. Is that directed to me personally, or the company?

Q. The company, sir? A. The answer is very little contact, practically none.

Q. You do have some, but it is a minor part of your overall operation? A. Practically none.

Q. You actually manufacture your own products as distinguished from packaging or combining the products of other people?

A. That is so.

Q. You are a basic manufacturer yourself?

A. Yes.

* * * * * *

Q. Now, Mr. Minich, with respect to Nuodex Products, Inc.,—and my questioning from now on, until I advise you to the contrary, I am talking merely about Nuodex, not Heyden?

A. Yes, sir.

Q. Would you advise the Court how you control your sales efforts of Nuodex? A. Yes, sir. Historically, since 1932, Nuodex has turned over the active solicitation of business to so-called sales representatives, usually corporations. Nuodex now employs some seventeen sales representatives, and they are usually companies or corporations. And they in turn employ a considerable number of employees. Nuodex does not sell actively. Nuodex has turned over the task of sales solicitation to these sales representatives throughout the United States, and in fact throughout the world.

Q. Well, let me go into that in a little more detail with you. As

a matter of fact, within the United States you have six regional sales managers, do you?

A. Yes. Actually, the task of the Nuodex sales department is to provide the necessary assistance through advertising, technical service, and so forth, to the agents, and particularly upon request by the sales representatives.

Q. But under these six regional sales offices, you have these various commissioned sales agents that you retain on an exclusive territorial basis, right?

A. That is so.

Q. And they work under your six regional sales managers, these sales agents? A. Substantially so.

Q. Whenever there is any problem of price, Nuodex handles it direct rather than having these commissioned agents handle it, right? A. No.

Q. Do you permit your commissioned sales agents to price your product? A. Sir, Nuodex establishes list prices from which it does not deviate, and the sales representatives are authorized, therefore, to sell at the established posted list prices without specific authorization from the head office.

Q. Look, Mr. Minich, isn't it a fact that in your sales agent agreements that you have a specific restriction on the sales agents monkeying with the price at all; aren't they required only to sell at your price and to refer any discount situation back to your regional sales manager?

A. Well, you are only saying, sir, what I have just stated; namely, that they are selling at the list prices which Nuodex, as the manufacturer, establishes.

Q. All right. Getting back to my question, it is a fact, isn't it, that you do not permit those agents to price your product; you control all the pricing for sales?

A. Yes, that is so.

Q. All right. Now, so far as promotional literature concerning your product is concerned, who supplies that to these agents? A. Our promotion department.

Q. And that is Nuodex itself that puts the literature together and distributes it? A. That is so.

Q. And do you also have direct mail contact with the accounts throughout the country? A. No, only through the sales representative,

Q. When we are talking about the sales representative now, we are talking about agents rather than your regional offices? A. That is so.

Q. Now where do you maintain these technical services that you are telling us about? A. They are maintained at our laboratory building in Elizabeth, New Jersey.

Q. And they are available to service the problems of the customer accounts directly upon request being made from the sales agent through the regional sales office back to the plant, is that it? A. That is so.

Q. So that if Great Falls Bleachery, for example, up here in New Hampshire had a problem involving one of your products, upon their making the request through your agent in this territory you would send a man out of New Jersey to come up here and work on it with him if that were the sensible thing to do? A. If the sales representatives so desired it.

Q. And if they had a problem which could be handled by your working it over by laboratory test and analysis, how would you handle it ordinarily?

A. Again, the sales representative initiates the request and our internal sales supervision would usually approve such request, and then the technical department would execute the job.

Q. And the specific example that I just inquired about, if it were a matter for testing, still using Great Falls, you would use whatever materials they had the problem with from New Hampshire to the laboratory in New Jersey, run your tests on it, and submit tests and results back up through channels to get back up here to the customer?

A. Well, I am not aware of any such direct activities. What occurs, to my knowledge, is that the sales representative, or his employees in any particular area, would obtain the specimen, and then they would be submitted, mailed, to the

Nuodex office, and it would be processed, and then they would again be returned to the sales representative. He in turn might pass them on to his employees.

* * * * * *

Q. As a matter of fact, you have no concentration of Nuodex personnel any closer to New Hampshire than the metropolitan area in New York? A. That is so.

Q. So that when you get outside of metropolitan New York, you are away from home base in this direction, whether you are talking about Massachusetts, Rhode Island, Vermont or Maine, they are all the same, they are beyond where you keep your facilities and personnel?

A. Yes.

* * * * * *

Q. And there is a Nuodex representative for New England, including New Hampshire, according to your own representations, is there? A. Nuodex has a sales representative, D. H. Litter Company, a corporaton, doing business in New York, in the metropolitan area, and maintaining a branch office in Boston. The Boston office is not Nuodex sales representative, because the contract, the relationship, the history, is between Nuodex Products Corporation and the D. H. Litter Corporation.

Q. And who do you list here under the heading: there is a Nuodex representative in your area. Who do you indicate is at Allston, Massachusetts?

A. The D. H. Litter Company.

Mr. Brown: We offer the document.

(Document handed to Mr. Sulloway by Mr. Brown.)

Mr. Sulloway: I have no objection.

The Clerk: Received and marked Plaintiff's Exhibit No. 1.

* * * * * *

Q. And which of you gentlemen would be most familiar with what the actual contractual relationship with Litter is?

A. Well, I believe I could adequately answer you on that.

Q. All right. How long have you employed Litter as a corporate salesman for your company?

A. Since 1932.

Q. And with what frequency has the contractual arrangement between your company and Litter changed during that interval, if at all? A. The relationship has continued intact without any major changes since 1932.

Q. And they still continue for you on substantially the same basis up to the present time?

A. That is so.

Q. And have a contract set-up that covers through for the next two years with a one-year option of renewal and to be renewed thereafter unless canceled by one of the other parties? A. That is so.

Q. Has the relationship been formalized by any correspondence or written contract? A. Through the years there was no written document, but in March of 1955 a written contract was put into effect.

Q. And that is March 10, 1955?

A. March. I do not know the exact date.

Mr. Brown: May we have the letter of March 10, 1955, from Mr. O'Neil, D. H. Litter Company, produced?

Mr. Sulloway: This is our only copy, so far as I know, of that letter.

(Letter handed to Mr. Brown by Mr. Sulloway.) (Questions by Mr. Brown)

Q. And do you recognize, Mr. Minich, this copy of a letter which your counsel has produced from your files as being the confirmatory letter that Mr. O'Neil sent out?

(Letter handed to the witness by Mr. Brown.)

A. Yes, sir.

Mr. Brown: we would like to offer it.

Apparently, there is no objection.

The Clerk: Received and marked Plaintiff's Exhibit No. 2, produced by the defendant.

* * * * * *

Q. And you do know, do you not, that Mr. Elliott's claim arose here in New Hampshire, the damage was done here in New Hampshire, if there was damage; you know that?

A. Yes.

Q. And you are aware of the fact, are you not, that your product got into New Hampshire through the King Company in Massachusetts? A. Yes.

Q. You are aware now of that fact?

A. Yes.

Q. Now at the time that you were putting this particular product out, you understood and expected that the product would be widely disseminated into substantially all the states in the United States, did you not?

A. That is so.

Q. And your whole effort and program with respect to the product Super-Adit was directed to accomplish that to the best of your ability? A. That is so.

Q. And as part of your servicing of accounts, you are set up and expect and represent to the trade that you will service problems in connection with getting your product into use, as you except it to be used?

A. That is so.

Q. And that includes servicing Super-adit as it is being distributed under your system?

A. But at the discretion of the sales representative.

Q. Oh, surely. But, for example, if King Company had any questions with respect to the method of introducing Super-Adit into King Company's greenhouses paint, your technical staff and your laboratory facilities and your field organization which you send out when problems arise, all of those people are available and were available to assist the customer account King in putting your product into its product, right? A. I cannot answer that in the affirmative for the following reason, that far more times—let's put it this way, that many times the sales representative on his own initiative in the field will make recommendations in order to effectuate a sale. And so the sales representative has considerable opportunity for rendering, let's call it, technical service in the trade through his knowledge of

what has happened in the case of his other towns through his knowledge of the Nuodex literature.

Q. And you had quite a lot of experience as a result of what happened in these King Company greenhouse cases, which you are applying presently in the fashion you have just indicated? A. I do not understand the question.

Mr. Brown: Strike it out.

(Questions by Mr. Brown)

Q. Whether the sales representative does it, whether someone else does it, your own organization is established and available, and was established and available to help an account such as King with whatever problems it might run into in introducing your product Super-Adit into King's paint, isn't that so? A. That is so.

* * * * * *

Cross Examination

(Questions by Mr. Sulloway)

XQ. Mr. Minich, you have been asked a good many questions about servicing your product. How many occasions do you know of with respect to customers in New Hampshire during all the period when you have been familiar with it that anybody has given any service from your company?

A. I am personally not familiar with a single instance.

XQ. Well, do you know whether on one occasion Mr. Galbraith did go to the Great Falls Company in connection with a complaint. A. I heard of that, yes, sir.

XQ. You have heard of that? A. Yes.

XQ. Have you heard of any other case?

A. No, sir.

XQ. Now reference has been made to the fact that there has arisen out of a sale to the King Company this litigation. Now was that sale to the King Company made in Massachusetts by the Litter Company? A. That is so.

XQ. And at no time in connection with the Elliott Company that bought this product, or whatever they bought from King Company, did the Nuodex Company have any connection with it in New Hampshire? A. That is so, sir.

XQ. They did not? A. They did not.

XQ. Now you have explained that your sales representative in New England, which would cover New Hampshire, is a corporation known as the Litter Company, is that right, or it is a corporation? A. It is a corporation known as the D. H. Litter Company.

XQ. D. H. Litter, of which the president and general manager is whom? A. Mr. D. H. Litter.

XQ. And where is he? A. New York City.

XQ. And you are aware of a branch of the Litter Company situated in Allston, or somewhere outside Boston?

A. I am, sir.

XQ. Are there any sales made in New Hampshire by anybody except somebody working for your representatives, that is Litter Company in Massachusetts?

Mr. Sanders: Could I have that question repeated?

(The last question was read by the reporter.)

The Witness: No, no other sales.

(Questions by Mr. Sulloway)

XQ. Now has the Nuodex Company any financial interest in the Litter Company? A. No, sir none at all.

XQ. Has it any stock interest in it or any financial connection whatsoever that you know of?

A. None at all.

XQ. None at all. Does the Litter Company act as sales representative for other corporations other than Nuodex in New England? A. Oh, yes. The D. H. Litter Company—and this I only know from my personal contact with Mr. Litter, not operationally—the D. H. Litter Company also does business in petroleum solvents for the Anderson-Pritchard operation.

XQ. This is in New England you are referring to?

A. In New England.

XQ. Yes? A. And it also sells the products of the Aluminum Corporation of America, and they handle the products of the Davison Chemical Company, and I believe Godfrey Cabot. They are, in other words, an enterprise which does

not depend on the Nuodex representation solely, but has a number of other, I believe eight other very substantial principals.

XQ. Now you have described in general terms what the Litter Company is supposed to do. Will you just tell the Court what the procedure is when somebody that is working for the Litter Company, a corporation, makes a sale; just what happens to it; is the invoice made out, and what is the procedure with regard to it?

Mr. Brown: Your personal knowledge.

Mr. Sulloway: Yes.

(Questions by Mr. Sulloway)

XQ. You are familiar with that, aren't you?

A. Well I am not familiar with the exact mechanics of that to provide the exact details. But in principal, Nuodex has no control over the effort made upon individual prospects by individual employees of the D. H. Litter Company. Nuodex looks toward the D. H. Litter Company for a total result, gauging as it can, the approximate magnitude of a total market.

XQ. Can you tell us what happens when some employee of the Litter Company takes an order from somebody, what the procedure is? A. Well, the order is ultimately processed and usually serves as a release order against a warehouse stock that may be geographically in line. Sometimes the release would be made directly from our factories.

XQ. Well, do you have a warehouse in Massachusetts where you have property? A. Yes, we do, sir.

XQ. And when you refer to a release made from that warehouse, do you want us to understand that in some cases the order goes to that warehouse owned by you, or the property owned by you, and is then delivered by the Nuodex Company from that warehouse? A. That is so.

* * * * * * *

XQ. Does Nuodex Company own any warehouse in Massachusetts?

A. The answer is no. I understand your question to say does Nuodex own a warehouse or property in it, and I answered in the affirmative because Nuodex does own the inventory of its products in such a warehouse.

XQ. In other words, you have a stock of goods in Massachusetts, is that right? A. That is so.

XQ. And it is in a warehouse which you do not own?

A. That is so.

XQ. But you control the in and out of that inventory in that warehouse, is that right? A. We own the inventory, sir. That is our product, not the agent's product.

XQ. And you referred in your testimony that in pursuance or completion of an order, sometimes it is released from that warehouse in Massachusetts, is that right?

A. That is right.

XQ. And sometimes it would be released by the company from some warehouse or some property outside of Massachusetts, is that right? A. That is so.
That is so.

XQ. And I think I have asked you, I'm not sure, there is no such collection of property of the Nuodex Company in New Hampshire? A. None whatsoever.

XQ. And you have no agent residing there?

A. None.

XQ. You have no telephone listing?

A. We do not.

XQ. And you have no property there that you know of anywhere in New Hampshire? A. We have none.
The Court: You mean you don't have none, or have not had any?
(Questions by Mr. Sulloway)

XQ. Have you ever had any, the time you have been there, any property in New Hampshire? A. No, we never have had any.
The Court: These answers that you are giving are not directed solely to the present, but the past, is that right?

The Witness: It is true of the past, also, Your Honor.
The Court: All right.
(Questions by Mr. Sulloway)

XQ. Have you ever appointed any agent in New Hampshire for the service of process, suits, in New Hampshire?

A. No.

XQ. I am not sure whether you have told us about where the Nuodex Company is incorporated, under the laws of what state is it incorporated?

A. New York.

XQ. Now I take it, I am not sure whether you know or have been old enough to know who the customers of the Nuodex Company were in New Hampshire during the years 1953, 1954 and 1955, and the amount of sales; do you know that?

A. Sir, I do not know the names of the accounts. I do know that the sales volume in proportion to our total within the New England area, and in proportion to our total national business, has been extremely slight.

XQ. Well, do you know the total amount of business that you do in New England on Nuodex products that are sold in New England? A. Approximately two hundred fifty thousand dollars per year, approximately.

XQ. And do you know whether the sales in New Hampshire exceed five thousand dollars a year?

A. I believe that they have averaged only about one per cent of our total New England sales. I am not familiar with the exact magnitude of that figure.

XQ. And Reiter is here? A. Yes, sir.

XQ. And did he last night go over all the invoices and make a computation? A. That is so.

XQ. You have referred to the total business in New England. What is your total business in the United States, or total business — A. The total business in the United States is somewhat over six million dollars.

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(Questions by Mr. Upton)

XQ. You have testified that sales of Super-Adit were made by Nuodex to the King Company, as I understand your testimony, is that right? A. I understand that through the D. H. Litter Company that sales of Super-Adit were made to the King Company.

XQ. And those sales were made in 1953 and 1954?

A. I believe so.

XQ. Now what would be the course of business; how would those orders be placed and filled?

A. Through the D. H. Litter Company.

XQ. Would they be forwarded to Nuodex to be filled?

A. That depends, sir, on the individual transaction. Usually, they would be filled from a warehouse stock, in this case from the Boston warehouse stock. On occasion when the stock happens to be depleted, it might be replenished or the order might be directly placed against the factory.

XQ. And who had control of that warehouse stock?

A. The D. H. Litter Company.

XQ. As your agent or representative?

A. As the representative.

XQ. Now were these sales made on credit?

A. That is so.

XQ. And who determined whether credit should be given to the King Company? A. Credit management, sir, rests with the manufacturing company; in this case Nuodex Products.

XQ. Would these orders be forwarded to Nuodex for approval?

A. No. First it would establish credit. Such orders would be filled directly upon the sales representative's responsibility. In the case of new accounts, a credit search would first be undertaken.

XQ. Are we to understand that the account of King Company was an old account? A. Sir, I am not familiar with that circumstance.

XQ. How would the billing be done?

A. The billing in all cases is done by the manufacturing Nuodex Products Company.

XQ. So that this order would be passed through the Nuodex Company? A. That is so.

XQ. And billing would be made by Nuodex Company?

A. That is so.

XQ. I said this order. I suppose I should say these orders, because there was more than one order from the King Company for Super-Adit during 1954 and—

Mr. Sullovay: You will have to answer instead of nodding your head.

The Witness: The answer is yes. I'm sorry.

Mr. Upton: I hadn't finished my question, but I think your answer was timely.

(Questions by Mr. Upton)

XQ. And payment would be made by the King Company to whom?

A. To the Nuodex Products Company.

XQ. So that actually, these were transactions between the Nuodex Company and the King Company?

A. The payment between the King Company—yes, the payment would be tendered by King to Nuodex.

XQ. Now King Company was engaged in the manufacture and sale of paints? A. I so understand.

XQ. And Super-Adit is sold by Nuodex for use in paints?

A. That is so.

XQ. And King Company in 1953 and 1954 was doing business through northern New England, selling its products in northern New England, including New Hampshire?

A. I am not familiar with the sales area of King Company.

XQ. You know they were doing an extensive business?

A. Yes.

XQ. But you don't know the precise territory which King Company served? A. I do not.

XQ. You have referred to this warehouse in Massachusetts where your products are stored for delivery to the trade. Who controls this warehouse and this inventory of stock and trade? A. The sales representative releases products directly from the warehouse. The sales representative

in turn instructs the manufacturing company, the Nuodex Products Company, as to the amount of stock he wishes to have maintained in his area.

XQ. Now how long has this been the course of business between you and your sales representative?

A. Sir, I believe from the very beginning.

XQ. And who pays the rent for the warehouse?

A. Nuodex.

XQ. So that Nuodex is in control of the warehouse and of the stock and trade? A. Nuodex is the owner of the inventory and pays all charges, yes, sir.

XQ. And Nuodex is registered as a foreign corporation doing business in Massachusetts?

A. That is so.

XQ. That is, you are registered in Massachusetts as a foreign corporation doing business there?

A. That is so.

XQ. And have been for how long?

A. I would estimate for three years. I am not certain on that point.

XQ. You have been registered there as a foreign corporation for at least three years? A. At least. Might be much longer.

XQ. When I say you, I mean the Nuodex Company?

A. Yes.

Mr. Upton: That is all.

Mr. Sulloway: I have just one question.

Redirect Examination

(Questions by Mr. Brown)

Q. You indicated to Mr. Sulloway that there were no sales into New Hampshire of Nuodex Products unless they came through Litter, is that right?

A. That is my understanding, sir.

Q. Well, if in fact these items which I show you—incidentally, are those Nuodex Products items?

A. They are, sir.

Q. One of them is Adit? A. Right.
Q. The other one is Super-Adit?
A. That is so.
Q. Super-Adit is the one that got into the King paint?
A. That is so.
Q. If you can go into stores in New Hampshire and buy these in original packaging under your label, and Litter says they didn't sell them into New Hampshire, do you know of your own knowledge how they are available on a retail basis here; do you actually know?
A. I do know this, sir, that a number of the so-called national paint firms, such as Sears Roebuck and Devoe-Reynolds, they have central purchasing points. They might have purchased such bottles, for example, in Philadelphia, and then they might have trans-shipped a quantity into the outlets in this area. Nuodex obviously has no control whatsoever over the trans-shipments or intra-company transactions that take place with our products, after the customer has acquired them.
Q. Let me ask you this, sir: if there is a little small store such as Dover Supply, which isn't a chain, that is just a local retail outlet in New Hampshire, and you can buy this on their shelves, what is the explanation; do you have one, do you know what the trade channels might be?
A. Mr. Clark might be much better qualified to furnish you such an explanation.

* * * * * *

Herbert M. Johnson

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

(Questions by Mr. Brown)

Q. Mr. Johnson, would your state your full name for the record?
A. Herbert M. Johnson.
Q. And where do you live, sir?
A. Andover, Massachusetts.

Q. What do you do for a living?
A. I am a salesman.
Q. Do you know anything about Nuodex Products?
A. Do I know anything about them?
Q. Yes? A. Yes, I know something about them.
Q. You have been selling them at least since 1950, have you?
A. That's right.
Q. In New Hampshire? A. I have been selling them everywhere in our territory.
Q. You are actually on the pay roll of the D. H. Litter Company in Boston? A. That is correct.
Q. And Mr. Cookingham, who is sitting down here, is your superior in charge of that office?
A. That's right.
Q. Your deposition was taken in this case sometime back?
A. That's right.
Q. Do you have with you, Mr. Johnson, your call card so that you can tell on what particular dates from 1950 through to the spring of 1955 each occasion that you made trips into New Hampshire for the purpose of soliciting or selling Nuodex products? A. Selling all our products, you are talking about. Whenever I make a trip, I go to sell all the products of all companies we represent.
Q. Do you have with you your records that you had at the time of the deposition so that you can advise the Court with respect to each trip as you did at the time of your deposition? A. No.

Mr. Sulloway: Well, his records are here. They are the same records, I understand.

* * * * * *

Q. Mr. Johnson, I want to start out by asking you whether or not on March 20, 1950, you made a sales effort call at Milford Paint? Do you know what records you want to look at to find out whether you went to Milford Paint on that date? A. Well, is it in the deposition there? That is about the only—

Mr. Sulloway: We have here, if I may state—at the

time of the deposition, inquiry was simply as to 1953, 1954, 1955, and then request was made for the production of papers relating to earlier transactions, and those are here.

Mr. Brown: All I want is the witness to have his papers so he can intelligently answer questions.

(Records handed to the witness by Mr. Sulloway.)

(Questions by Mr. Brown)

What is that date again, first?

March 20, 1950. I have a copy of the report here, called there.

You called at Milford Paint at Milford, New Hampshire?

That's right.

What did you discuss with them there on that occasion?

I discussed resins and oils, which we were selling at the time for Falk and Company.

Mr. Sulloway: Keep your voice up, please, so everybody can hear.

The Witness: That was the main thing I discussed were alkyds, resins and oils produced by Falk and Company whom we were representing at that time. And I also discussed, apparently, all our principals. And at the end I say, "Keeping us in mind for Aluminum Company's 1571 paste and Nuodex driers."

(Questions by Mr. Brown)

All right, your own report indicates that you discussed Nuodex driers with them and said they were going to keep you in mind for that product at the time of that particular visit?

A. I would say I think so, yes.

Mr. Johnson, I am going to suggest that in the examination on these trips, if you will direct your attention to what, if anything, took place with respect to Nuodex business; since we are, as you know, not concerned with your other principals.

A. I see.

Mr. Sulloway: He was representing half a dozen principals.

Mr. Brown: I am not concerned with anything except

Nuodex business. And answer my questions only in terms of Nuodex. If Mr. Sulloway wants to talk about Aluminum, and Pritchard and everything—

The Witness: Every call I make I of course try to sell everything for all the companies we represent.

The Court: Is that a fair statement of your entire activity from 1950 to 1954, that your calls were not solely for Nuodex but were for all the products, is that what you are saying?

The Witness: That's right. I mean, every call I make I am making on behalf of all the companies we represent. (Questions by Mr. Brown)

Q. You told us at the time of the deposition that you considered every account as a potential account for every other principal if you kept on doing business with them and things developed properly?

A. That's right.

Q. Now let me ask you next about May 4, 1950; were you in New Hampshire with respect to Nuodex Products again on that date? A. Yes, I was.

Q. Where were you then? A. Well, I have a report here I called on Milford Paint Works at that time.

Q. What did you discuss about Nuodex Products at Milford Paint, then? A. I have here, "Discussed Nuodex driers. He has used some Ferro material, which is competitive material, but will keep Nuodex in mind."

Q. Is that only reference to Nuodex on that?

A. That's right.

* * * * * * * *

Q. Going back to 1950, Mr. Johnson, what is the next date according to your 1950 records that you made a trip into New Hampshire with respect to Nuodex Products?

A. I have a report here, September 27, 1950.

Q. Now who did you visit on that trip?

A. I called on Resin Research.

Q. Where is that? A. Manchester, New Hampshire.

Q. What did you discuss with them with respect to Nuodex

A. I have, "Uses a little Cobalt drier. Quoted on one hundred pound container. Nuodex Cobalt, six per cent."

* * * * * * *

Q. Do you also have a note on that that Boston is going to handle this one? Do you have a note that Boston will handle? A. Oh, that has to do with this sample of Crumbhaar resin.

Q. Which is another principal? A. That's right. I have, "Send a sample." And Mr. Cookingham wrote, "Boston will handle" on it. The original on this goes to our New York office.

Q. Did you visit any other accounts in New Hampshire on the 27th of September? A. I have no record of making any other calls. If I did, I don't remember. I can't remember unless I have a written record.

Q. Very well. Now going to 1951, Mr. Johnson, would you advise the Court what the first date was in 1951 that you were in New Hampshire?

* * * * * *

Q. Now, Mr. Johnson, while we have been talking here, have you found your January 20 trip to Nashua Gummed and Coated Paper? A. 1951?

Q. Yes? A. No.

Q. You haven't found any reference to it at all?

No. Just November 20, 1951.

Q. Well, let me ask you this, sir: Nashua Gummed and Coated Paper Company, the concern in Nashua, New Hampshire, is a regular Nuodex account, isn't it?

Yes.

Has been for years? A. Yes.

And whenever you are in Nashua and the time is available, as a standard goods salesman's job, you make it a point to visit them, not specifically to sell on that trip, but to keep in contact with that account?

That's right.

Q. And what is the item that Nashua Gummed and Coated Paper regularly uses, do you have it in mind?

A. Yes. It is Nuodex 84.

Q. And they order that periodically without any prompting as they need it? A. That's right.

Q. Do you actually handle the order taking at Nashua Gummed and Coated Paper, do you take their orders?

A. Well, if I happen to be there and they gave it to me, they would.

Q. But as a general proposition, do those orders go through your hands at all? A. No, they usually send them in

Q. And then they send them in ordering from New Hampshire, and then the order is filled by Nuodex and shipped into New Hampshire, that is the ordinary operation?

A. That's right.

Q. Now let me ask you this, sir—

A. That particular item we don't stock in Boston, so they send their orders direct to Nuodex, and they ship from New Jersey.

Q. The only thing that gets into Boston's file on that particular transaction would be a copy of the invoice, which is submitted to Boston just to let you know the business has been done? A. Yes, that's right.

Q. Now let's go to another account, Putnam Manufacturing Company, the F. A. Putnam Company over in Keene; that is a regular Nuodex account, isn't it?

A. I don't know whether you call it a regular account. I guess they may be. They may buy, you know, very small amounts once or twice a year. I guess it is a regular account.

Q. It is a regular account? A. I guess you would call it a regular account if they bought over a period of two or three years.

Q. Well, they certainly bought since 1950, to your knowledge haven't they? A. Yes.

Q. And they use Cobalt, Nuodex Cobalt, over there?

A. That's right.

Super-Adit? A. I don't believe they use any Super-Adit. They may have had samples, a small amount for experimental work. I don't believe they have ever had any commercial quantities.

Let me ask you about another one. Do you remember the Tintomatic Corporation? A. Yes.

What was that; what is your experience with that concern, if you recall? A. I called on them. They were in Goffstown, New Hampshire. I called on them to see if they might use anything that we might sell. And as I recall they were making these tinting cubes which are used to tint white paint. And as I recall, I was trying to sell them on the idea of using aluminum, making aluminum cubes for tinting. And do you know whether or not Nuodex Products wrote directly to Tintomatic in February of 1951 soliciting Nuodex business there? A. Did I have a letter on that?

* * * * * *

You find such a letter? A. Yes.

* * * * * *

The Witness: This letter is in connection with Nuodex, Vickers-Armstrong Division.

Mr. Sulloway: Read it.

The Witness: He says: "Dear Mr. Rhynes: I was discussing the Unerol described in the attached folder with Jack McCabe the other night, and he thought that the Unerol was peculiarly adapted for your operation and suggested we drop you a note. The Unerol may be set for each—" well, it just goes on to describe—

(Questions by Mr. Brown)

Mr. Sulloway wants you to read it.

"Unerol may be set for each paint formula, and setting can become part of the formula, meaning that batch after batch skinning strength could be developed. If you would care to send us at our dispersions labratory in Hillside, New Jersey, five gallons each of your pre-mixed paste, we would be very

happy to make a study so that on some trip to the New York area we could give you exact figures as to what output the Unerol would give you. Naturally, we would like to know what fineness you desire for each paste you send. Perhaps it will be better if you would send us four ounces each of the same paste that you are sending us after they have been ground on your present equipment. We could use this paste as a control, not only for fineness, but also for tinting strength, which does not necessarily follow. Very truly yours, Nuodex, Vickers-Armstrong Division, H. M. Johnson, vice-president."

And a copy of this letter went to D. H. Litter in Allston, D. H. Litter, New York, J. McCabe, W. A. Houston.

Q. And Mr. Houston is a Nuodex sales manager at that point?

A. I don't know.

Q. You don't know? A. At that time, what his title was.

Q. What about Mr. McCabe? A. I don't know who McCabe is, or was, or is.

Q. Now let me ask you, Mr. Johnson, did you stir up that business, or was that something that Nuodex generated by direct contact; do you recall?

A. I don't recall. As far as I know, this Mr. McCabe is involved. I don't even know who he is.

Q. Your contact with Tintomatic was not with respect to this problem that apparently Nuodex was handling direct?

A. This is machinery.

Q. Yes? A. This is machinery.

Q. You were not involved in any part of that particular transaction yourself? A. No. Of course I think I followed up on this letter from him.

Q. You followed up, but you didn't initiate, that is what I am trying to get at; is that the situation?

A. That's right; according to the letter, I didn't initiate this.

Q. All right. Now, Mr. Johnson, it is true, is it not, that Johns-Manville Corporation in Tilton, New Hampshire, is a regular, steady, recurring account with Nuodex?

A. I wouldn't call it an account. But I guess they are.

Q. Well, look: whether you would call them —

Mr. Sullaway: Wait a minute. Did you finish?

The Witness: They buy in gallon quantities which are not commercial quantities, actually.

(Questions by Mr. Brown)

Q. What you are saying is, they don't buy enough to interest you as a commissioned salesman, as a representative of a commercial salesman's house, is that right?

A. Well, you never know what may develop into something larger.

Q. It is a fact, isn't it, that over the years, at least the last four or five years, that Johns-Mansville in Tilton has regularly and repeatedly purchased and repurchased Nuodex products? A. That's right.

Q. And it is an account which is a regular account of Nuodex, isn't that so? A. I guess you would call them that, that's right.

Q. Have you ever called on Johns-Mansville?

A. No.

Q. So you don't know whether there is other business up there or not, personally, do you?

A. No.

Q. You would say they are not a very large account. Let me ask you this, sir: did you ever attempt to get business for Nuodex at Manchester Narrow Fabrics in Manchester, New Hampshire? A. I believe I called on them once.

Q. Without success? A. And I called to see if they were doing any treating of fabric for the Government which would require fungicides.

Q. And if they had been, you would have been prompt to attempt to get some Nuodex business if you could have for that one? A. That's right.

Q. Did you ever, yourself, have anything to do with American Twine and Fabric Company here in New Hampshire?

A. No.

Q. That was in Salmon Falls?

A. No.

Q. That was handled by other people than yourself?

A. Mr. Cookingham.

Q. Yes. Now let me ask you this, sir: at some point while you were selling Nuodex, was H. & H. Chemical Company in Epping, New Hampshire, an account?

A. I called on them.

Q. As a Nuodex prospect? A. As a prospect for any of the materials we sell. But I don't believe I ever sold them anything in any quantity as far as I can remember.

Q. But you did discuss and try to interest them and gave them some samples of Nuodex products, actually?

A. I believe so.

Q. Is that the same concern, Mr. Johnson, that subsequently began doing business as Miljo Chemical in Epping; is it the same party? A. No. This one gentleman who started the H. & H. was originally with Miljo. Then he went off by himself and sort of started this H. & H., and is now back with Miljo. H. & H. no longer exists.

Q. H. & H. and Miljo actually were two separate accounts in Epping, or two separate prospects at Epping that you were working on the time they were both going?

A. One is in Epping, and one is in Exeter.

Q. And Miljo is surviving and is still an account that you call on? A. That's right.

Q. And Miljo you call on regularly and systematically each time you are in that area?

A. Yes, I call on them whenever I am up that way.

Q. Now what about Resin Research down in Manchester, New Hampshire, is that a regular account of Nuodex?

A. Well, I guess they have been buying for, I don't know, two or three years. Not very much, but at least a couple times a year, perhaps, they send an order in for one hundred pounds of this Cobalt drier.

Q. But they are a regular user of Nuodex products, and they are an account on which you regularly call when you are in that area? A. I haven't called on them regularly. I

wouldn't say. I don't think I have called on them for several years.

Q. And they are only buying small amounts now?

A. I think I called on them once or twice, that's about all.

Q. They are a recurring account; they have for a number of years used Nuodex products, and still do?

A. That's right. They order as they need it.

Q. And they order it direct, not relying upon solicitations by you? A. Well, they send the orders into us in Allston.

Q. And you service that account out of the Allston warehouse?

A. That's right. I think we just had a shipment the other day to them.

Q. And who does the billing on the account when it is handled through Allston? A. Nuodex does the billing on all Nuodex material.

Q. All of the billing is done from Nuodex direct to the account? A. Yes, that's right.

Q. And all payments from the account are made direct to Nuodex? A. That's right. That is, the check will always be made out to Nuodex.

Q. In your own records, is there any relationship between the Nashua Corporation and Nashua Gummed and Coated Paper Company? A. Nashua Gummed and Coated Paper Company, the name was changed to Nashua Corporation.

Q. So that when we run into those two names, that is actually the same concern? A. Yes, that's right.

Q. All right. Now what about New England Paint Works over in Goffstown, did you solicit that as an account for Nuodex?

A. Well, New England Paint Works and Tintomatic Corporation are the same. They are the same account.

Q. One succeeded the other? A. Yes, that's right.

Q. All right. And you have also, in New Hampshire, solicited business at International Shoe in Manchester?

A. International Shoe, yes.

Q. And, incidentally, you did discuss Nuodex products with them at one point when you were soliciting in Nashua?

A. I think on one call I checked to see whether they might be a

prospect for a particular Nuodex item, a new line they had come out with, that's right.

Q. And you also visited Hermsdorf Fixtures in Manchester?

A. Yes.

Q. Was that visit with respect to any Nuodex product at that time that you made the visit?

A. No.

Q. That was one where you called on Hermsdorf while you were there to see International, and you did not consider them to be a prospect for Nuodex at all?

A. No, I called on them in regard to one of the other materials we sell.

Q. Yes. Now the Great Falls Bleachery over in Somersworth, New Hampshire, that is a regular account of Nuodex and has been for some years? A. Yes, that's right.

Q. Right? A. That's right.

Q. There isn't any question about that?

A. No, that's right.

Q. You serviced the account? A. That's right.

Q. And when they have technical problems over there, the Nuodex people come up to give them a hand solving it?

A. That's right, if they have a problem. If they had any problem, a Nuodex technical man would assist them, that's right.

Q. And with what regularity do they order from New Hampshire, order Nuodex materials, is it a regular, recurring order?

A. I don't know. They haven't been coming through very good lately.

Q. Let's talk back in 1953 and 1954 and up to the beginning of this year?

The Court: Actually, that is what you are talking about in all instances, isn't it?

Mr. Brown: I propose to show the business from 1950 through the beginning of this year in the total evidence, Your Honor, and I am not concerned, actually, with what they are doing from now on, but what they are doing from

that period.

The Witness: They were ordering regularly in the years 1953 and 1954, that's right.

(Questions by Mr. Brown)

Q. What is the particular item at Great Falls Bleachery that was the big regular order, do you recall?

A. That was a Nuodex 100 WD.

Q. And what is that particular item?

A. That is a textile fungicide.

Q. Again, something used in Government work?

A. It might be.

Q. Have you ever made calls at General Electric in New Hampshire? A. Yes.

Q. Have you ever succeeded in selling them any Nuodex products? A. No, I don't believe I ever discussed Nuodex products with them.

Q. Are you sure you didn't? A. As far as I can recall, I didn't.

Q. Another account which was a regular account here in New Hampshire after they came up here was Simplex Wire and Cable Company over in Portsmouth, right?

That's right.

And you solicited the continuation of their business here in New Hampshire? A. That's right. They have been buying in Cambridge, and when they came up here, they continued to use that same material.

What about New England Chemical Company in Merrimack, New Hampshire, do you visit down there?

Yes.

And did you at any time personally attempt to promote any Nuodex business at New England Chemical?

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The Witness: I don't recall discussing any Nuodex material at Merrimack at New England Chemical. They were buying petroleum solvent from us, and that's all they were a prospect for.

(Questions by Mr. Brown)

Q. There again, their line developed into one that could have accommodated a Nuodex item, if it did, you would have been prompt to point it out to them?

A. Yes. If he asked if we had driers, I would certainly try to sell them to him.

Q. You also made efforts to sell Nuodex products to the New England Cable Company here in Concord?

A. New England Cable Company in Concord I called on once as a potential prospect for vinyl stabilizers. However, I found that they weren't in that line of business.

Q. But that was an item which you were attempting to get business for, manufactured by Nuodex?

A. If they were using vinyl stabilizers, I would have tried to sell them Nuodex vinyl stabilizers.

Q. As a matter of fact, that attempt here in Concord, New Hampshire, represented the farthest north you got in the central section of New Hampshire?

A. That's right.

Q. What about Hampshire Manufacturing, did you solicit business there? A. Hampshire Manufacturing in Nashua, they are in the slush molding of vinyls, and I called on them once and found that they were buying prepared plastisol and consequently were not a prospect.

Q. Now have we mentioned, Mr. Johnson, substantially all of the New Hampshire accounts that you either had or attempted to get on the Nuodex account?

A. I would say so.

Q And the regular accounts are the Nashua Corporation, Milford Paint, Great Falls Bleachery, Simplex Wire and Cable, F. A. Putnam, Resin Research and Johns-Manville?

A. Well, I don't believe Simplex is buying any more. At the time, they were.

Q. And the other concerns that we have talked about were what you considered to be prospects or had purchased at sometime or other, and you were attempting to get business back? A. Either prospects or potential prospects.

Q. And in your efforts on Nuodex's behalf, what did you have for selling material? A. Well, I have the literature, any literature that Nuodex puts out.

Q. And they do put literature out, do they?

A. Oh, yes.

Q. Descriptive and technical data with respect to their products? A. Yes, that's right.

Q. And they supplied all of that to you, and you distributed that as necessary as it would be helpful in your travels?

A. That's right.

Q. And on occasion samples supplied by Nuodex were also distributed? A. Yes, that's right.

Q. Now when you ran into complaint in the field, you referred those complaints back to Nuodex for their attention, or the attention of their technical people, is that right?

A. That's right.

Q. And that was the way that you were operating during this period that we have been talking about?

A. That's right.

Q. You did on occasion actually pick up orders at Milford Paint yourself, is that right?

A. I believe that is so.

Q. But generally your solicitation did not include picking up the actual orders? A. That's right.

Q. Let me ask you this, Mr. Johnson: it is true, is it not, that magazine advertising put out by Nuodex did, during this period, create sales here in New Hampshire, which you subsequently had to call on?

A. Yes, I mean, any company, a technical man in any company might see an ad in a magazine and might write for a sample, in which case I would follow it up.

Q. And were there mailing lists to which new material or new technical material would be sent out periodically by Nuodex on your accounts? A. Yes, we have mailing lists.

Q. And in your selling up here in New Hampshire, through the assistance of the advertising and the technical material, advertising material they supplied, would you use Nuodex's

name in connection with your selling activities?

A. Oh, yes.

Q. And is Nuodex a good name in this field, a good name to get business on? A. Oh, yes, they make good products.

Q. A product that is made by Nuodex has some acceptance in the industry in which you travel for?

A. I would say so.

Q. Now would you give us here again, generally, what your duties were as selling agent for Nuodex? Now you sold for them; you promoted their product, right?

A. Right.

Q. You gave such assistance as you could and were asked for by their customers in the field?

A. That's right.

Q. And you also had duties of attempting to establish as many new accounts as you could?

A. That's right.

Q. And do you recall you told us on your deposition that generally, those generally were the duties that you had and that you were operating under at that time?

A. That's right.

Q. Now in connection with assisting the customers, Mr. Johnson, you yourself have some technical background?

A. Yes.

Q. And would you tell the Court why you are selling chemicals, what your background is? A. I have a B. S. in Chemical Engineering.

Q. You are a chemical engineer yourself?

A. That's right.

Q. And among the type of things that you might be called upon doing, what would you do, or what did you do, when you received a complaint at Great Falls Bleachery that the trucking services that they were getting were not good on deliveries of Nuodex products; how would you handle such a complaint, how did you handle it there?

A. Well, in this particular case, of course, we didn't stock the material in Boston. It was being shipped from New

Jersey, therefore I believe I wrote a note to Nuodex asking them to ship by some different trucker so that they would get better service.

Q. And then Nuodex followed through on that and satisfied the account, as far as you know?

A. That's right.

Q. You also told us, did you not, that in part your efforts here in New Hampshire were to maintain existing business as distinguished from soliciting new accounts or building up business? A. Yes, that's right.

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(Questions by Mr. Sanders)

XQ. How long have you been with Litter Company, Mr. Johnson?

A. Almost nine years.

XQ. Is Mr. Freeman still employed by Litter Company?

A. No.

XQ. And approximately when did Mr. Freeman cease his activities on behalf of the company? A. In New Hampshire, you mean?

XQ. On behalf of the company; on behalf of the Litter Company?

A. I don't know what the day was. I would say it must be around—I can't really say, maybe three to five years ago.

XQ. And up until the time he ceased his entire connections with Litter Company, did he by-and-large solicit from and service the various New Hampshire customers for Nuodex Products? A. For D. H. Litter Company?

XQ. Yes? A. Yes.

XQ. And following his termination of his relationship with the company, you began handling the New Hampshire customers in the place of Mr. Freeman, who departed?

A. As a matter of fact, I started handling them before he departed.

XQ. A very few months before? A. A few. Maybe a year; maybe a year before.

XQ. Now I am sort of interested in the various types of

Nuodex products from, say, 1952 right up to the present time you have either sold or endeavored to sell to New Hampshire customers. Now taking up your Nashua Corporation, or formerly Nashua Gummed and Coated, I think you told Mr. Brown that you particularly discussed and sold Nashua Corporation over these years in 84, which is a wetting agent? A. Nuodex 84, which is a fungicide.

XQ. A fungicide? A. Yes.

XQ. And in addition you have sold Nashua, or at least tried to sell Nashua, Nuodex Cobalt?

A. I don't believe so.

XQ. You have caused samples to be shipped of Nuodex Cobalt, haven't you? A. Oh, that was something a fellow was playing around with.

XQ. All right, you have endeavored to sell them Nuodex Cobalt, haven't you? A. All right, yes.

XQ. Do you mean yes? A. Actually, the fellow had an interest in it for something of his own that he was playing around with, polyesters or something.

XQ. Go ahead and explain yourself?

A. It makes no—I mean, I gave it to him with the idea of selling Nuodex Cobalt.

XQ. To Nashua Corporation? A. Yes, that's right.

XQ. Now you also endeavored to, from time to time, to sell Nashua Corporation Nuostaves?

A. Nuostaves.

XQ. Nuostaves? A. Yes.

XQ. What are Nuostaves? A. I checked with them to see if they were using any vinyl stabilizers, so they weren't.

XQ. Do I understand that you on at least one occasion endeavored to sell Hampton Manufacturing in manufacturing vinyl stabilizers? A. Hampshire.

XQ. Hampton, I am sorry. Hampton Manufacturing in Nashua?

A. I am not familiar with Hampton Manufacturing.

XQ. Hampshire My error. Hampshire Manufacturing in Nashua?

A. That's right.

XQ. Did you tell Mr. Brown that from time to time you endeavored to sell Simplex in Portsmouth Nuodex wetting agents?

A. That's right.

XQ. And with reference to New England Paint, have you endeavored to also sell that outfit Nuodex Cerium?

A. Nuodex Cerium?

XQ. Yes? A. They may have had a sample.

XQ. If you caused a sample to be sent to that outfit, were you endeavoring to make a sale?

A. Oh, yes, that is the only reason I send samples.

XQ. What is Cerium? A. Cerium, it is a metal.

XQ. For what purpose, used for what purpose?

A. It is a metal that is used as a catalyst. In this case it is a metal soap. Cerium.

XQ. Did you ever have any contact with either, by personal visit or otherwise, with Judson Dunaway of Dover?

A. Yes.

XQ. Tell us what you recall about that?

A. I don't recall very much. I know it must have been over five years ago. I think I called on them one time. I don't remember what I talked about.

XQ. Do you remember that you gave them literature on Nuodex 87?

A. I don't remember it, but I imagine I did if you have a record of it.

XQ. Don't imagine what I have, if I have anything. But do you recall that you probably discussed with Judson Dunaway Nuodex 87? A. I don't recall. But I called on them, I know I called on them. Very possibly I discussed Nuodex 87.

XQ. Well, what is Nuodex 87? A. That is a fungicidal material that is used for a wall wash, anticeptic.

XQ. What information did you have about the nature of Jud-

son Dunaway's business which led you to discuss Nuodex 87 with that outfit? A. I thought they might be interested in it.

XQ. Do you have any present recollection of what you then knew concerning the nature of that outfit's business?

A. No, I can't remember anything.

XQ. Now when you called on New England Cable in Concord, did you leave them some literature on Nuostaves?

A. I don't recall. I very possibly did.

XQ. When you called on International Shoe, did you also leave that outfit Nuostaves literature?

A. I am not certain, but I imagine I probably did.

XQ. If you talk to us in terms of probabilities rather than imagining, the record would look a little more like a court record. A. I mean, I can't actually recall. I probably did. I know I discussed vinyl stabilizers with them. Therefore, I probably gave them the literature.

XQ. Now you have told Mr. Brown that Great Falls was a regular repeating customer over a considerable number of years for N 100 WD? A. Yes, that's right.

XQ. In addition, have you from time to time endeavored to sell Great Falls Bleachery Nuophene?

A. That's right.

XQ. What is Nuophene? A. That is a fungicidal material also.

Mr. Upton: Nuodex?

The Witness: Manufactured by Nuodex.

(Questions by Mr. Sanders)

XQ. Now what is Nuodex 60; is there such a thing?

A. 60? I never heard of Nuodex 60.

XQ. Is there a Nuodex CO 60, Cobalt 60, maybe?

A. Cobalt 6.

XQ. Cobalt 6? A. Six per cent.

XQ. And have you on occasions endeavored to sell Resin Research Nuodex CO 6? A. Yes; they buy it.

XQ. Now in the case of the Miljo concern in Exeter, have you

endeavored to make sales of Nuodex products and given that outfit from time to time Nuosperse samples?

A. That's right.

XQ. What is Nuosperse? A. Nuosperse? It is a wetting and dispersing agent. I gave them a sample of it.

XQ. And have you on occasion left literature concerning Nuosperse with Miljo, the Miljo outfit?

A. I believe I did.

XQ. Nuosperse, of course, is a Nuodex product?

A. That is it.

XQ. Now referring to F. A. Putnam in Keene, what sort of Nuodex products have you over the last, say, the last four years endeavored to sell this outfit?

A. Well, we sell them Cobalt.

XQ. I didn't ask you what you actually sold them but what you endeavored to sell in the way of Nuodex products?

A. Oh, I believe he mentioned he was interested in rare earth drier, so I sent him a sample of cerium and zirconium.

XQ. Those are both Nuodex products?

A. That's right.

XQ. And have you also tried to sell Putnam Nuact paste?

A. I believe I sent them a sample of that material.

XQ. And you have actually sold Putnam Super-Adit on a few occasions? A. I don't know if we sold them or whether they just had samples. They may have had a gallon. They may have bought a gallon, I don't know.

XQ. And have you sold and succeeded in selling Putnam Nuodex Manganese? A. I believe they use Manganese, Cobalt.

XQ. In connection with your Nuact paste, have you given Putnam on occasions, different occasions, both samples and literature concerning that paste?

A. Yes, on one occasion.

XQ. And, again, have you endeavored to sell Putnam various Nuodex driers, paint driers?

A. Yes, they buy them as you said there.

XQ. You mentioned Nuosperse in connection with the other

customer. Have you also endeavored to sell Putnam Nuosperse on different occasions? A. I don't recall. I probably did.

XQ. You say you probably did? A. Yes, it is possible.

XQ. Now in connection with Milford Paint, have you either discussed or sold the following Nuodex products to that customer: driers? A. Yes.

XQ. Nuomix? A. Yes.

XQ. Exkin? A. I would say yes.

XQ. Lead? A. Nuodex products.

XQ. Let's continue here. Lead?

A. Yes.

XQ. Paste? A. What was that last?

XQ. Paste? A. Paste?

XQ. Yes? A. Paste? What kind of paste?

XQ. I'll tell you in just a second. Nuact paste?

A. Nuact paste, yes.

XQ. Cobalt? A. Yes.

XQ. And Super-Adit? A. Yes.

XQ. Once again, all of these have been Nuodex products?

A. That's right.

XQ. Now do you recall any further New Hampshire business outfits upon whom you have called in an endeavor to sell Nuodex products? A. No, I can't recall any others than those mentioned by yourself and Mr. Brown.

Mr. Sanders: You may inquire.

(Questions by Mr. Sulloway)

XQ. Mr. Johnson, you have referred to taking up the question of trucking with Great Falls?

A. Yes.

XQ. And in general servicing your customers with regard to matters. Has there ever been any occasion when anybody from the Nuodex Company has come to New Hampshire in connection with any complaint or otherwise with reference to the sale of Nuodex products by you to that company?

A. No.

XQ. Well, was there one occasion when a Mr. Galbraith came up here? A. Yes. He didn't come in connection with me or one of my accounts at the time.

XQ. Well, then, you know nothing about what he did at the time? A. I only know from what I heard. Of course we went over it on the deposition and so on previously.

XQ. Well, then, so far as all of these customers that you have referred to, there has never been any occasion at any time when anybody from the Nuodex Company has come into New Hampshire to do anything about those accounts, is that right? A. That's right.

XQ. Now in connection with your going around New Hampshire to these various companies, what of these companies did you solicit for business on other products that you were selling other than Nuodex products?

A. Which of the companies, sir?

XQ. Yes? A. Well—

XQ. Did you ever solicit Putnam Company for other products?

A. Oh, yes.

XQ. What? A. I tried to sell them Aluminum powder.

XQ. And by the way, tell the Judge how many other different companies other than the Nuodex Company products were you representing the products of, just name them?

A. We represent, I believe it is, about seven other companies.

XQ. Who are they? A. Anderson-Pritchard Oil Corporation.

XQ. That is a large oil company? A. Yes. Aluminum Company of America, Crumbhaar Chemicals, Divison Chemicals, Central-Sawyer Company, Daniel Products Company; Crown Oil Chemical Company and of course Nuodex.

XQ. Now in all of your trips to New Hampshire in connection with Nuodex business, did you attempt to sell these other products? A. Oh, yes.

XQ. Well, were there cases where you only consulted a company with reference to Nuodex products alone?

A. On some particular call, yes. I mean, possibly on my initial call at any company, I would discuss all the products to see if they were prospects for any particular one of them. If they were just prospects for Nuodex material, of course on a Nuodex call I would just undoubtedly talk about Nuodex material.

XQ. You refer here to Putnam Company, The Nashua Corporation, The International Shoe, Hermsdorf Products, Great Falls Bleachery Company, New England Chemical, in connection with the sale of Nuodex products, were those companies contacted with reference to your other company products?

A. Oh, yes.

XQ. All of them? A. Oh, yes.

XQ. And in general, in your sales of these other products, how did they compare with the total sales of Nuodex products of New Hampshire? A. I would say they were quite a bit larger, that there was no tremendous volume on anything, but they were much larger than Nuodex sales.

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XQ. Now I will ask you that, Mr. Johnson: on what basis are you paid by the Litter Company; are you on a salary basis?

A. Yes, on a salary basis.

XQ. In other words, you are paid for whatever you do by the Litter Company? A. Yes, that's right.

XQ. And you have nothing to do with any commissions or anything that the company earns from the Nuodex Company, except from the amount of business that you get, is that right?

A. Which the company charges, the Litter Company charges Nuodex for, that's right.

XQ. In other words, the Nuodex Company pays the Litter Company according to the arrangement, and you get a salary from the Litter Company? A. Yes, that's right.

XQ. That's right. And you have no connection as to being hired or being fired by the Nuodex Company?

A. That's right.
XQ. You are simply an employee of the Litter Company?
A. That is correct.
XQ. And is it a fact that your part of the sales operations of the Litter Company has been in general to handle the New Hampshire customers? A. Well, I handle for D. H. Litter Company, I handle southern New Hampshire, Vermont, Eastern New York State, Massachusetts, north and west of Boston, and Western Connecticut.
XQ. Well, is there anybody else connected with the Litter Company, unless Mr. Cookingham sometimes comes up, that solicits business in New Hampshire?
A. No, no one else.
XQ. And reference has been made here to the Bleachery Company; is that a customer that you go to?
A. Yes, I call on them.
XQ. Do you take orders from them?
A. I would take an order from them whenever they gave it to me, yes.
XQ. Do they send in orders direct, sometimes?
A. That's right.
XQ. And in that event, you are notified?
A. That's right.
XQ. That is, the Litter Company is notified?
A. That is correct.
XQ. So that you have a record of it?
A. That is correct.
XQ. And as in other cases, goods are shipped either from the Boston warehouse, or if not there, from New York?
A. That is correct, yes.
Mr. Sulloway: That is all.

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Recross Examination

(Questions by Mr. Sanders)

XQ. Now, Mr. Johnson, on a very great number of occasions when you have come into New Hampshire, isn't it a fact,

that you have discussed with the New Hampshire customer or prospect only Nuodex products?

A. If I had called on them previously and determined that that was the only thing they were a prospect for, yes.

XQ. Now on practically every call you have made to Great Falls Bleachery, you have discussed only — strike it out.

XQ. On practically every call you have made over the last four years to Great Falls Bleachery, have you discussed only Nuodex products?

A. That is right, for the reason that I know they are not prospects for any of the other materials we sell.

XQ. And on practically all your calls during the last four years on Nashua Corporation, have you discussed only Nuodex products? A. No.

XQ. I say on practically all? A. No.

XQ. Well, you have on many occasions discussed only Nuodex products on your calls to Nashua Corporation, haven't you?

A. I don't think there has been any time I have called there and discussed only Nuodex.

XQ. Are your call reports here? A. Yes.

XQ. Would you take a look at your call report on November 1, 1954?

(Witness looking through records.)

A. Yes.

XQ. November 1, 1954? A. On Nashua?

XQ. On Nashua? A. There it is.

XQ. Now on this occasion, you discussed what Nuodex products?

A. I discussed Nuostaves.

XQ. And what else did you discuss?

A. I discussed Crumbaar resin.

XQ. And that is manufactured by whom?

A. Crumbhaar Chemicals, Inc.

XQ. Now on 9-22-54, on your Milford Paint call?

A. On Milford Paint?

(Witness looking through records.)

Yes.

XQ. What did you discuss? A. I discussed, apparently, Alcoa Aluminum, Super-Adit, Nuodex driers I apparently mentioned, Baker Castor Oil, Thixain, Mineral Spirits, Anderson-Pritchard material, and alkyd resins, which would be Crown Oil Chemical material.

XQ. To shorten it up, is it fair to say that of all the prospects or customers whom you have ever over all these years visited in New Hampshire, the only customers whom you have visited and whom you have not solicited for Nuodex business or whom you have actually not sold Nuodex products are (1) General Electric, (2) New England Chemical, (3) Hampshire Manufacturing of Nashua, and (4) Hermsdorf? A. Hampshire I discussed Nuodex products with.

XQ. With Hampshire you discussed Nuodex products?

A. Yes.

XQ. All right, then, it is fair to say that of all the customers you have ever visited in New Hampshire, the only ones to whom you have neither mentioned Nuodex products nor sold Nuodex products are (1) General Electric, (2) New England Chemical, and (3) Hermsdorf? A. I would say in general that is correct, yes.

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Mr. Brown: Mr. Loxley, please.

Irving K. Loxley called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

(Questions by Mr. Brown)

Q. Would you state your full name, sir?

A. Irving K. Loxley.

Q. Where do you live, sir? A. In Providence.

Q. Providence, Rhode Island? A. Right.

Q. And what is your occupation?

A. I am branch manager for Heyden's branch office, sales office, in Providence.

Q. You are a subordinate of Mr. O'Neil?
A. Pardon me?
Q. You are a subordinate of Mr. O'Neil?
A. That's right.
Q. And how long has Mr. O'Neil been heading up your sales activities? A. Very recent, about one month.
Q. It is a 1955 development? A. Right.
Q. Prior to that time, he was a Nuodex man?
A. That's right.
Q. And had been with Nuodex for a number of years?
A. I assume so.
Q. He is now the vice-president of Heyden in charge of sales and marketing, and the vice-president of Nuodex in charge of sales and marketing? A. Yes.

* * * * * *

Q. Do your salesmen in any way presently promote the sale of Nuodex products?

The Court: Have you finished?

Mr. Brown: Yes, I have finished. I am waiting to see what my brother desired.

Mr. Sulloway: He can answer that.

The Witness: They do not promote Nuodex products.

(Questions by Mr. Brown):

Q. In any way? A. In any way.
Q. Now let me ask you again the question I previously asked you: have you received any instructions from Mr. O'Neil with respect to how you should tie your operations in with the Nuodex sales effort?
A. No, sir.
Q. None whatsoever? A. None whatsoever.
Q. And have you received any such instructions from anyone else in the sales organization above you?
A. To tie into Nuodex Products, no.
Q. Whether to tie in, sir, or to not tie in, have you received any instructions at all?
A. None.
Q. Covering the relationship? A. None.

Q. Incidentally, who is the president of Heyden Chemical?
A. Mr. Simon Askin.
Q. And who is chairman of the board of Nuodex Products?
A. I don't know.
Q. Mr. Askin? A. He may be.

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William James Houston called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

(Questions by Mr. Brown)

Q. Would you state your full name and where you live for the record, Mr. Houston? A. William James Houston, Summit, New Jersey.
Q. What is your occupation? A. General sales manager, Nuodex Products Company.
Q. Where is your office? A. Newark, New Jersey.
Q. How long have you held that position?
A. Since approximately January of 1955.
Q. And prior to that assignment, what was your position with Nuodex? A. Manager of paint industry sales.
Q. Any territorial jurisdiction on that?
A. The forty-eight states, domestic United States.
Q. And prior to that time, what was your position with them before that? A. Regional sales manager.
Q. In what region? A. In the eastern region of the United States.

* * * * * *

Q. Do you recall whether or not you wrote a letter to King's chemist, Mr. Jerome, under date of November 20, 1951?
A. I could have, I don't know.

Mr. Brown: May I request that Mr. Houston's letter under that date be produced, and I think you gentlemen will find it in your 1951 correspondence file with King.

Mr. Sulloway: Well, I fail to see that the sales to King Company in Massachusetts has anything to do with this case.

The Court: Well, it might not, but at the moment the question is can you produce it.

Mr. Sulloway: I don't know. We will look and see. But I would object on the ground that what they are doing in Massachusetts has nothing to do with this question.

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Mr. Brown: I believe in the letter there will be a statement which I believe is an admission that the Litter Company is the representative of Nuodex in the area which encompasses New Hampshire. It just happens to be in a letter to King. I would like to have the letter produced. I am interrogating about it.

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Mr. Sulloway: I still object to any correspondence with King Company. It has no bearing on whether we were doing business in New Hampshire, and I object to it, Your Honor.

The Court: Well, I would like to hear the contents of it, probably, before I can—read it, let's see what the contents are?

(Questions by Mr. Brown)

Q. Would you read the letter itself?

A. "Dear Sir: Our representatives, D. H. Litter Company, Inc., of Allston, Massachusetts, have requested that we send data to you on Nuact paste. We are attaching specifications and literature describing same. If we can be of additional assistance, please contact us. W. J. Houston, Sales Department."

Mr. Sulloway: I now say this is not in any way material on the question.

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Q. Subsequent to this letter, you became the regional sales manager in charge of this area?

A. I received the responsibility as regional sales manager for several territories, two of them the New York and New England territory.

Q. What I am trying to get at is when you became the regional sales manager? A. I honestly can't fix the precise date. I think it was in 1952 sometime. I will tell you this, the

function, we will say, from that date to the function six months later didn't vary greatly.

Q. Well, when you became regional sales manager, the sales agents in each one of the territories within your region were subject to your instructions, advice and general supervision, right? A. Advice, I would say, yes, primarily.

Q. But you were responsible in the Nuodex operation for their sales efforts within your own region?

A. Yes, sir, for the collective result.

Q. And at that point, Mr. Cookingham's organization in Boston were your sales efforts people under you as regional sales manager, right? A. Yes, sir.

Q. Now when you write directly through to an account such as you did in this instance to King, and you offer any additional assistance in addition to putting them in contact with your sales agent, what additional assistance did you have available and did you make reference to; what were you appraising them of? A. Well, anything that we can do in the normal good course of sound business that tends to reinforce our manufacturer's representative's local position, we do, if good business permits it.

Q. I assume that is so. Would you just indicate in general what the services were that you had to offer and were offering at this time? A. Laboratory service, technical service, where it was possible for us to do it, and again business practice warranted doing it where our agent or representative might request that a certain job be done, samples, product data.

Q. Anything else? A. I would think that would be the typical scope of what we would offer to reinforce our manufacturer's representatives sales effort, product data, samples, technical service.

Q. Would you, as an individual in that job that you held, would you advise a customer account directly how to use the Nuodex product, would you, Mr. Houston, do it?

A. If he called on the phone, for example, possibly yes. But normally the occasion would be to advise our representative,

who would then advise him. But we would be the source of it, if that is your question.

Q. And whether the request came directly to you or was relayed through the Litter Company, you would respond in either case if it were within the scope of what you had available?

A. Yes, I think that would be fair to state, yes.

Q. Do you recall writing into New Hampshire recommending methods by which to use Super-Adit?

A. I don't recall it, but again it is possible.

Q. Well, do you recall under date of October 29, 1952, writing to Mr. Haug of H. & H. Chemical?

A. No, sir, I don't recall.

Mr. Brown: May I ask that Mr. Houston's letter of October 29, 1952, to Mr. Haug of H. & H. be produced. . .?

* * * * * *

The Clerk: Received and marked Plaintiff's Exhibit No. 4, produced by the defendant.

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Q. Now, Mr. Houston, this injection of your own sales effort on this New Hampshire account is perfectly normal under the sales organization as it operated for Nuodex in 1953 and 1954, right? A. Augmentation, yes, not injection.

Q. Well, not only the offering of your services, as you did to Mr. Jerome, but you are actually coming through with services as you did to Mr. Haug, giving him suggestions as to how to use the product, that type of thing, that is perfectly normal to the way you are operating?

A. Yes, that is normal.

Q. That is part of your function?

A. Yes.

Q. As an employee of Nuodex, you were working on these New Hampshire accounts whenever the occasion arose?

A. I think it would be more accurate to state that we augmented the efforts of our manufacturer's representatives wherever the occasion demanded.

Q. Whenever either that sales agent or the customer himself indicated that you might be of service, your services were not

only available, but they were offered and made available to those customers? A. Yes, generally, that is right.

Q. And in the case of Mr. Haug, Mr. Haug originally wrote to Litter Company, did he not, do you recall?

A. I just saw that original underneath, yes.

Q. And he writes to Litter Company at Cambridge saying he would like to receive data and samples of Odorex driers and Nuodex Super-Adit? A. Yes, as well as solvents.

Q. As well as Odorex solvents. Now how did that request for information, what happened to it after it gets to Litter Company that has the result that you fill the bill?

A. Well, in this instance I don't know specifically how, but it could have been a memo or an extraction from the letter, or some other communication that would appraise us that certain information was desired.

Q. And then you, as a good sales representative of Nuodex, got right on the ball and took care of the situation direct? A. In this instance we took care of it by direct mail.

* * * * * *

Q. Let's go back in this file a little bit, Mr. Houston, on April 24, 1951, apparently you individually were working on a New Hampshire account, American Twine and Fabric Corportation at Portsmouth, New Hampshire?

A. Well, if you mean in the context of the letter, you ought to read it all, don't you think? It isn't a balanced thing.

* * * * * *

Q. Well, I don't want to misinterpret your letter; do you want to read your letter in and see what it says?

A. "American Twine and Fabric Corporation. Thank you for your recent letter. Our New England representatives are the D. H. Litter Company, Inc., 60 Cambridge Street, Allston, Massachusetts. They will be glad to work with you on the problem of mildew control on paper. In the meantime, since our Micro-biological Labratories are located here in Elizabeth, we will be glad to hear from you regarding any specific problem where a micro-bicide addition might be of value. For your general reference we are attaching a service data

sheet describing Nuodex 84 which has found application in the field of paper coatings, sizings, and preservation. We will look forward to hearing from you."

* * * * * *

Q. Perhaps I can help you. Do you recall whether as a result of your suggestion that you had your laboratory services available that you actually performed some laboratory work for this company? A. I don't recall, but I did see a copy of a report prepared by our factory, so I naturally concluded the work was done.

Q. As a matter of fact Mr. Minich, the present president of your company, was on this problem, wasn't he? Did he write a memo at some point on it?

A. Well, that could relate to the internal method of handling or request for laboratory work. I am not, again, certain, but it is possible Mr. Minich might have been vice-president in charge of research and development at the time, I don't know.

Q. That was about the time he became executive vice-president, wasn't it? A. I am not sure.

Q. Well, does it appear that a request from that account was received asking to have a conference on this particular problem in New Hampshire? A. Let me see.

(Letter handed to the witness by Mr. Brown.)

No, I would interpret that to mean that they weren't asking us, Nuodex, to call. They were asking our manufacturer's representative to call.

Q. Yes. And that was under date of June 11 that that request was made? A. Yes, that's right.

Q. Now subsequently a letter was sent to that company under date of the 15th of June which says the writer of the letter called on the company the day before, which would be the 14th of June? A. That was signed by Mr. Cookingham.

Q. Yes, and a copy of it to you?

A. Yes, sir.

Q. And does that indicate that there was a conference on the 14th on the mildew proofing problems at that plant?

A. Yes, it says quite clearly, we called on them yesterday. Mr. Cookingham stated that and wrote it on June 15, 1951.

* * * * * *

. . . Mr. Cookingham entered this picture as a result of our doing so by mail, I guess. He followed through with a personal visit and apparently picked up some material which was then sent to us.

(Questions by Mr. Brown)

Q. Was then sent to you at New Jersey?

A. At New Jersey, that's right.

Q. For test in your laboratory?

A. Yes, by our representative, that's right. That is the normal manner of field technical service, I would say.

Q. Then the next thing that happened to this particular one is that you test the materials, do you, and carry out the work in accordance or in response to Mr. Minich's memo dated June 13? A. Well, again, as I say, that is an internal handling. Mr. Minich, I think, referred to the fact that we internally evaluate these things, and at that time I might have sent it to Mr. Minich's office for processing.

Q. Well this indicates, does it not, that Mr. Minich wrote a memo concerning this New Hampshire account dated July 13, 1951? A. Internally, yes, that might refer. He might not have actually written it. The point was, it came out of our office.

* * * * * *

Q. Eventually, on this particular problem, Mr. Houston, Mr. Cookingham reported to you under date of the 29th of August that he had received a copy of the laboratory work which was done August 24 for American Twine and Fabric Company? A. Yes.

Q. And your last efforts on this one that are in this file indicate a memo from you to Mr. Cookingham advising him as of the 24th of July what the recommendations were after what was apparently an earlier laboratory report on the problem? A. No, sir. My memo states our laboratory's recommendation regarding subject's problem regarding mildew will be

available about August 15. That means he wrote me on July 20, probably asking me where the answer was, and checked with the lab and wrote them and said it won't be ready for a little longer.

Q. His letter making that request is also in the file?

A. Yes, sir. This would be one report, I honestly think. Just follow-up, actually.

Mr. Brown: I would like to offer, it it please the Court, the entire file that I have been interrogating this witness on. It is all clipped together in a folder entitled correspondence, 1951, New Hampshire, apparently from the D. H. Litter Company files rather than from Nuodex files.

* * * * * *

The Clerk: Received and marked Plaintiff's Exhibit No. 5, produced by the defendant.

* * * * * *

Q. Mr. Houston, at the close yesterday afternoon, your counsel produced an invoice form carrying the date February 29, 1952, covering a shipment to Nashua Gummed and Coated Paper Company. Can you tell us what the sales agent on that particular order is, or who is indicated as the sales agent?

(Invoice handed to the witness by Mr. Brown.)

A. This is not strictly an invoice. It is a sample order. And the distribution of this order would indicate to me that the Litter Company, our representatives, got a copy. That would be construed as the representatives in this instance.

Q. What actually is on the form as agent?

A. Well, under where it says agent, which in our business means representatives, we have--

Q. Yes? A. —we have L. Allston. Sales, W. J. H. I am W. J. H. And sales is the sales department, files. And L. Allston means the Litter Company.

Q. Their Allston office? A. Yes, that's right.

Q. Allston, Massachusetts? A. Yes, that's right.

Q. And, actually, that invoice indicates that the agent active on that particular transaction are three, doesn't it?

A. I don't understand that.

Q. The indication on the invoice is that sales and Mr. Houston and Litter are the agents involved, right?

A. No, the only representative involved, honestly, would be the Litter Company. The sales reference refers to sales files. It is an internal distribution of this type of document. Sales just means an internal designation within our company files. The W. J. H. refers to myself, who in 1952 was responsible for the territorial results through these representatives.

Mr. Brown: May we have this invoice form marked as an exhibit?

* * * * * *

The Clerk: Received and marked Plaintiff's Exhibit No. 6.

Mr. Brown: Do you gentlemen have the Johns-Manville invoice segregated as a group?

* * * * * *

Mr. Brown: I would like to offer as an exhibit, as one exhibit, the group of invoices covering sales to Johns-Manville Corporation, produced by the defendant Nuodex.

The Clerk: Received and marked Plaintiff's Exhibit No. 7.

* * * * * *

Q. On these papers which are Plaintiff's Exhibit No. 7, Mr. Houston, do you have the same type of designation as to who the agent is that appears on the sample order?

(Papers shown to the witness by Mr. Brown.)

A. Generally, the method of designating a distribution of an invoice would apply to sample orders also.

Q. Well, the first one on top here to Johns-Manville indicates sales W. J. H., those are your initials?

A. Yes, sir.

Q. And then D. H. Litter, A NY, what does that indicate?

A. This says D. H. L., A NY. This means D. H. Litter Company, the representative. A means Allston And NY means New York. Now that is what that would mean.

Q. So that in connection with this sale, the Nuodex sales division or department, whatever it is, and yourself, and Litter of Allston, and Litter of New York, are concerned with that

sale? A. Yes, among other internal distributions.

Q. What significance is there to the different order in which these designations are placed on the invoices?

A. None, really. As a matter of fact, that shouldn't say this shows concern with the sale. It rather shows how a clerk at an invoicing machine distributes copies.

Q. It appears, however, on Exhibit No. 6 that that is put in as the agent concerned, doesn't it, on the prior sample copy form? A. Yes. That refers to the distribution outside the company generally.

Q. And, again, on these invoices, the designations are still down, filling in agent and our order number, right?

A. Yes, they are in that general space, that is correct.

Q. Now are you aware, sir, that none of the Litter people, none of the Litter sales agents called at Johns-Manville; are you aware of that? A. Not personally. In the light of earlier testimony I am, yes. I might add you are referring to the facilities in the state.

Q. Yes. I suppose you also sell to their plants elsewhere than in New Hampsnire? A. In instances, yes.

Q. On a Johns-Manville sale, the sale originates by a purchase order coming out of Tilton to Nuodex, right?

A. Yes.

Q. And Nuodex's action on that purchase order, when they receive it, is to fill the order by shipping the goods back into Tilton, New Hampshire, right?

A. Yes.

Q. And then Nuodex invoices that shipment through to Tilton, New Hampshire? A. Yes.

Q. And at that point distribution is made to all of the interested people interested in sales to keep everybody advised that the shipment has been filled?

A. Yes, those that should know the transaction are so informed.

Q. Then the payment on the order runs from Tilton down to Nuodex, and that completes the transaction, is that right?

A. Yes, I believe so.

Q. And when we are talking about Johns-Mansville, the entire

operation, the entire sale, originates and terminates in New Hampshire without any assistance on the job from the Litter people, is that right?

A. I couldn't say that for certain, no, I don't know.

Q. Mr. Johnson's already testified he at least never contacted that particular account personally?

A. Personally, yes.

Q. You do keep in touch with a regular account such as Johns-Mansville by mail and samples which are sent either at their request or on your own initiative in the sales department?

A. Yes.

Q. And you keep them advised of new developments in your products and attempt to keep them interested in your line rather than letting them go over to competitors?

A. Yes.

Q. And that is part of your function, or was at that time as regional sales manager? A. Yes, that's right.

Q. Right? A. That is correct.

Q. And you had technical people available if there had been a call for them on such an account?

A. Yes.

Mr. Brown: May I have the Milford Paint invoices?

(Questions by Mr. Brown)

Q. Just one other thing about Exhibit No. 7, Mr. Houston: can you tell from looking at those invoices whether that material was shipped from Boston or from your New Jersey location?

(Invoice handed to the witness by Mr. Brown.)

A. Normal shipping packages were shipped from Elizabeth in all cases, as far as I can tell.

Q. What about Exhibit No. 6, the sample order, where was that shipped from?. A. Elizabeth, I believe, sample department.

(Invoices handed to Mr. Brown by Mr. Sulloway.)

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Mr. Brown: I offer as a group, invoices to Milford Paint

Works, Division of Windsor Embassy Chemical Company, Milford, New Hampshire.

The Clerk: Received and marked Plaintiff's Exhibit No. 8, produced by the defendant.

(Questions by Mr. Brown)

Q. I show you Plaintiff's Exhibit No. 8, which are another group of these incidentally, all of these documents were made up by Nuodex?

(Invoices shown to the witness by Mr. Brown.)

A. I believe so, yes.

Q. They come out of your New Jersey office?

A. Yes, sir.

Q. And all of these that we have been looking at are either agents' copies or divisional managers' copies?

A. I didn't honestly study each one, but—

Q. In this particular group, that is so?

A. Yes, that is quite apparent, yes, although I should say that might not necessarily be so, because the red circle or check indicates which process copy it is here. This is a pre-printed form, as you can see.

Q. When these invoices are made up, there is an agent's copy, divisional manager's copy, and other copies all made simultaneously? A. Yes, that's right.

Q. By your home office? A. Yes, that's right.

Q. These are copies of such forms?

A. Yes, that's right.

Q. Can you tell us you are on the distribution list on all of these, again? A. Yes, that's right.

Q. Can you tell us where those shipments were from, were they from Boston, or were they from Elizabeth?

(Invoices handed to the witness by Mr. Brown.)

A. Apparently, there are six shipments, three of which were from Elizabeth and three from our warehouse stock in Allston.

Q. How do you tell the difference, Mr. Houston, from the form? A. We show route, which, if it names a trucker, which I believe H. P. Welch to be, it means usually that the truck

handled it from our plant in New Jersey to wherever the shipment was supposed to go. If it shows Allston or any other warehouse, with the date, that normally means the date of release from a warehouse anywheres in the country, and then we invoice following the shipment.

Q. So the situation is that unless Allston warehouse appears over on the left side of the form, the shipment probably comes from your factory stocks?

A. Yes. This refers to commercial shipments, not samples and gallons and what have you.

(Invoices handed to Mr. Brown by Mr. Sulloway.)

Mr. Brown: I offer the Resin Research invoices as a single group.

The Clerk: Received and marked Plaintiff's Exhibit No. 9, produced by the defendant.

(Questions by Mr. Brown:)

Q. Now, Mr. Houston, I show you Plaintiff's Exhibit No. 9; that is another batch of Nuodex invoice forms?

(Invoices shown to the witness by Mr. Brown.)

A. Yes, sir.

Q. And does it indicate with respect to Resin Research that in every instance except one the shipments did come out of either the Allston warehouse or the Medford warehouse in Massachusetts? A. That is correct.

Q. But one of the orders came by Welch, and you interpret that to mean that it came from New Jersey?

A. I do.

Q. And are you on the distribution of all of these sales?

A. No, I am not. Of these two, I am.

Q. You are on A. Two of the six, I think it is.

Q. On the first two as they are attached together. And who is FXD? A. Frank X. Dwyer, who succeeded me as regional sales manager, I think, July 1, 1953.

Q. So that on these, which are in 4-1-53, you are on as regional sales manager, but when we get up to August and September of 1954, it is Mr. Dwyer?

A. That is July.

Q. He has replaced you in that particular job?

A. That is correct.

(Invoices handed to Mr. Brown by Mr. Sulloway.)

Mr. Brown: I offer as a group, Your Honor, the copies of invoices to Great Falls Bleachery and Dye Works, Inc., located in Somersworth, New Hampshire, produced by the defendant Nuodex.

The Clerk: Received and marked Plaintiff's Exhibit No. 10, produced by the defendant.

(Questions by Mr. Brown)

Q. I show you Plaintiff's Exhibit No. 10, Mr. Houston, which are the Great Fall Bleachery invoices, and would you check through those and advise the Court whether they came from Massachusetts or from New Jersey?

(Invoices handed to the witness by Mr. Brown.)

A. They all, apparently, were shipped directly from our plant in Elizabeth.

Q. So that the situation that we found so far indicates that by-and-large these shipments into New Hampshire didn't come from Boston at all, but came from your plant down in New Jersey, the majority of them?

A. The majority to this Great Falls thing, yes.

Q. On the other ones we found so far, Resin Research, all but one coming from Boston, and we found three other invoices coming out of the Boston or Allston warehouse?

A. That is correct.

Q. Now on the top invoice that we have here in the Great Falls Bleachery group, we have got another initial, KCB; now who is that? A. Robert C. Brumberger.

Q. And who is he? A. At that time he was manager of Fungicide sales, which was an administrative function, primarily.

Q. Did Mr. Brumberger at any point in the game, to your knowledge, intercede to assist and help New Hampshire accounts? A. Not personally, no.

Q. You are sure of that? A. To my knowledge, not personally.

Q. I see. It wouldn't surprise you, I assume, if he should happen to have written two accounts helping them with your problem, New Hampshire accounts?

A. That would not surprise me.

Q. That would be consistent with his job at that time?

A. Yes, sir.

Q. Would he be a fellow who might be interested in attempting to get business at International Shoe in Manchester, for example, a shoe concern? A. Yes.

Q. That would be within his field?

A. That would be within the field as it was, yes.

Q. That would be slightly different field of sales from the job that you had when you had paint—was it paint and varnish? A. That is correct, paint industry sales.

Q. And Mr. Dwyer, I suppose, would be apt to be helping on New Hampshire accounts after he replaced you as regional sales manager, again, as you did?

A. Yes.

(Invoices handed to Mr. Brown by Mr. Sulloway.)

Mr. Brown: I offer as an exhibit Nuodex invoices to F. A. Putnam Manufacturing Company, Inc., 50 Emerald Street, Keene, New Hampshire.

The Clerk: Received and marked Plaintiff's Exhibit No. 11, produced by the defendant.

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(Questions by Mr. Brown)

Q. I show you Plaintiff's Exhibit No. 11, Mr. Houston, invoices to Putnam in Keene does it appear that all but one of those shipments were from New Jersey rather than from Allston?

(Invoices handed to the witness by Mr. Brown.)

A. Yes, that is correct.

Q. And were you on the distribution list on some of those?

A. About half of them.

Q. And Mr. Dwyer succeeded you about halfway through this batch? A. About that, yes.

* * * * * *

Q. Would you take a look through these other two that apparently Mr. Sanders and I have inspected and see whether there is any record in there that indicates whether any of these orders went through Litter?

(Files handed to the witness by Mr. Brown.)

A. Well, here is one which came out of Allston warehouse to Milford Paint, which I think obviously has gone through our representative.

Q. What is the date on that particular invoice that you speak of? A. This invoice date is June 4, 1952, to Milford Paint Works, covering a release made on May 27, 1952, from Allston warehouse.

Q. And what copy is that yellow copy that you are looking at, what is the designation of the copy?

A. The top simply states duplicate invoice, which I mentioned earlier is a form you make extra copies off from. This actually, I presume, would be the copy for the Litter Company's office in New England.

Q. And this agent's copy, which is included in Plaintiff's Exhibit No. 8, is another copy of the same invoice?

(Invoice shown to the witness by Mr. Brown.)

A. Yes, apparently it is. This is marked duplicate. Oh, wait a minute, I'm sorry. This duplicate, you will notice this is attached to a letter by our credit manager.

Q. This is a duplicate that is made up later when trying to get money out of Milford Paint?

A. That is correct. "Send the letter to Milford Paint and apprise our representative of what we are doing and why."

Q. So that the fact that that duplicate invoice happens to be in this file is actually not any indication that the order, original order, went through Allston rather than going direct, right?

A. Well, if you mean the fact that the invoice is here for some other reason, yes.

Q. That is a duplicate?

Mr. Sulloway: Let him finish.

(Questions by Mr. Brown)

Q. Go ahead and finish?

The Court: Go ahead.

The Witness: Well, the invoice copy, duplicate, is here for reason of credit collection operation. Now the fact that it is here would naturally show that the release point does tell you. But you are right, per se. Well, it is difficult to say. This does give you the inference that it came out of Allston warehouse.

(Questions by Mr. Brown)

Q. We already know that things come out of the Allston warehouse. That doesn't mean the order runs through Litter. You would requisition? A. Not necessarily, you are correct.

Q. Now aside from that duplicate that was made out for credit purposes, is there anything else in that file which sheds any light on which way the orders were routed coming in, Mr. Houston? A. Well, there is a call report here on June 11, 1952, by--

Q. Herb Johnson? A. Johnson, Milford Paint Works, ordered five gallons Nuact with an okay next to it, which I would infer Mr. Johnson prepared the order and it was duly processed. Here is an instance where this is not a commercial shipment, but we did get talking about samples. H. & H. Chemical Company wrote Litter Company and asked for samples on Odorex driers.

Q. That is the transaction you and I talked about yesterday?

A. I think it was, yes.

Q. Well, here is the Nashua Gummed and Coated Paper Company, Nuodex sample— A. This is a Nuodex order form, dated February 28, 1952, which was sent. As a matter of fact, this is Litter Company's copy of an original which went to us against which we shipped the sample. So I would infer from that that the request for sample came through our representatives in the Allston office.

Q. All right. Now that is not a sale, that is a sample. That is sample distribution? A. That is correct. I think you asked me about that before.

Q. Yes. A. As a matter of fact, here is Mr. Johnson's writeup

of that sample.

Q. What is this? Is this the invoice on the sample?

A. No, I don't think so. This is four ounces.

Q. All right. A. Here is the invoice. The sample order packet slip is what it amounts to, not an invoice, is in front of this supportive evidence.

Q. All right. A. Here again is the same mechanics with Putnam on a sample of Nuact paste.

Q. So on that whole file for 1952, you find two sales that apparently went via Litter, and two sample distributions?

A. Yes.

Q. For the entire year of 1952?

A. Yes.

Q. So that the other transactions shown by the invoices presumably were handled direct, so far as the record shows?

A. So far as that record shows, it could have been handled.

Q. Incidentally, these aren't records you were referring to?

A. No.

Q. Your company Nuodex should have records on this?

A. No, I said we have correspondence files kept for operational purposes for two years, I believe.

Q. Don't you think they would be as far back as 1952?

A. I couldn't say for sure. There is no reference made to an order here that I can see.

Q. In 1950 you find no reference?

A. (No answer.)

Mr. Brown: I offer as a group invoices to Nashua Gummed and Coated Paper Company, produced by the defendant Nuodex.

The Clerk: Received and marked Plaintiff's Exhibit No. 12, produced by the defendant.

Mr. Brown: And I offer as a separate exhibit invoices to Simplex Wire and Cable Company, Portsmouth, New Hampshire, produced by the defendant Nuodex.

The Clerk: Received and marked Plaintiff's Exhibit No. 13, produced by the defendant.

Mr. Brown: And I offer as an exhibit a single invoice to H

& H. Chemical Company of Epping, produced by the defendant Nuodex.

The Clerk: Received and marked Plaintiff's Exhibit No. 14, produced by the defendant.

(Invoices handed to the witness by Mr. Brown.)

(Questions by Mr. Brown.)

Q. Now, Mr. Houston, I have asked you to look at Plaintiff's Exhibits Nos. 12, 13 and 14, to advise us whether those shipments were from the Massachusetts facilities or from your New Jersey facilities?

A. In the case of these shipments, they all appear to have gone from our Elizabeth plant.

Q. All of them? A. Yes, that's right.

Q. And in this batch we even caught an original invoice, apparently, is that right?

A. I doubt if it is an original. It is probably a copy. The originals: they go to the customers, as you can imagine.

Q. You don't know what the explanation is for an original showing up here? A. It doesn't say original. It is a white copy. Might have been. Sometimes you can make only ten copies at once. They might have needed eleven, something like that.

Q. I see.

Mr. Brown: Do I understand correctly, Mr. Sulloway, that that is all the invoices you have produced on sales items?

Mr. Sulloway: Will you come back, Mr. Ransmeier?

Mr. Brown: Are those all covered in your little tabulation?

Mr. Sulloway: Are those all the invoices we have?

Mr. Ransmeier: Yes.

Mr. Sulloway: Of sales, yes.

* * * * * *

Q. What is a sample transaction in this business; how does a sample transaction come about?

A. In the chemical business it is a small, a minimum quantity, usually at no charge, of a chemical offered to assist the prospect or customer in evaluating the efficacy of the product, or potential efficacy.

Q. In one of these correspondence files that I just opened up at random on Mr. Sulloway's desk, is this blue agent's copy a copy of a sample order; is that what it says up here? A. Yes, that's right.

Q. And who is that being sent to?

A. Great Falls Bleachery and Dye, attention Mr. George Collins.

Q. What are you sending him up there for no charge?

A. Four ounces of Nuophene.

Mr. Sulloway: Your Honor, if it helps this case at all, we are willing to admit in many cases samples were sent to customers in New Hampshire. If it is important to show every single case, we can't tell without checking further. We are willing to make that admission.

The Court: Before you get into that, how did that transaction arise? We are interested in knowing that. How did that arise? You said you sent a sample to Great Falls. Why? I mean, on the initiative of the Company to do that?

The Witness: Your Honor, I will look here to see if I can give you a specific answer in one case.

The Court: That might be typical, I suppose, of the rest.

(Witness examining file.)

The Witness: Apparently, sir, Mr. Johnson, a representative of the Litter Company, made a call at Great Falls and discussed a Nuodex product which presumably had commercial possibility and achieved an agreement that possibly they would look at a sample of that product.

The Court: Well, is that the way most samples were handled; that is, Mr. Johnson proposed the idea, or someone proposed it?

The Witness: I would say the great bulk of samples we would send grow out of sales activity.

The Court: On whose part?

The Witness: On the part of our manufacturer's representatives throughout the country.

(Questions by Mr. Brown:)

Q. Now on this particular--

Mr. Sulloway: And it frequently happens that samples are sent, and we admit that.

(Questions by Mr. Brown)

Q On this particular transaction, Mr. Houston, let's follow it out the rest of the way. After Mr. Johnson calls and generates interest enough so that you send the sample, did a fellow by the name of Brumberger enter the picture then?

A. He entered it earlier. The sample was sent January 3, 1955. Mr. Brumberger wrote a letter on December 30, 1954.

Q. Actually— A. Now, his first —

Q. Go ahead. A. His first paragraph states: "You will be pleased to know that four ounces of Nuophene is being rushed to you per the D. H. Litter Company in Allston, Massachusetts, our local representatives." This letter of Mr. Brumberger's is dated December 30, 1954, so I would infer there was some earlier evidence of their interest in the product. I don't happen to have it.

Q. Mr. Brumberger is the head of what department of Nuodex?

A. At that time he was manager of Chemical Industry Sales, which involved fungicides of this type.

Q. And he wrote directly to Great Falls under date of December 30, 1954?

Mr. Sulloway: Now, Your Honor, I would like at this time to rise. We admitted from time to time that samples were sent. The particular thing he is now referring to is something that happened after the service of the writ. Now I don't see how it is material to go into every single transaction in 1955 or any other time when we admit that prior to that time we very frequently furnished samples, either through our salesmen or directly.

The Court: What I am trying to have made clear to me is the circumstances of the sending of a sample. Now this matter that you are going into—you brought in this Mr. Brumberger.

Mr. Brown: He is a top executive in Nuodex Products. I think the file Mr. Houston is now looking at indicates that Mr. Brumberger was on the New Hampshire account, not

only on this particular instance before the sample, but I think again afterwards.

Mr. Sulloway: But Your Honor will bear in mind

The Court: Just a minute. That is a specific instance. I mean, what is the general trend? Was that the usual mode? Did Mr. Brumberger enter into every sample transaction or how did they originate, and how did they eventuate?

The Witness: No, Your Honor, this letter is dated December 30, 1954.

Mr. Sulloway: Answer the Judge's question.

The Court: I mean the general picture, did Mr. Brumberger enter into every transaction in the previous years to 1954?

The Witness: Generally, Your Honor, no. The sample orders are routine.

The Court: Routine. And how are they routine? How do they become routine? How do they originate, and how are they filled? How are they initiated, put it that way?

The Witness: The bulk of them, sir, I believe grow out of the sales efforts of our representatives, who in turn report the desire on the part of someone or group of people for sample or samples. They go through in a routine way. We seldom, in the operative end, the administrative end, of the business, we seldom see evidence of it until the blue copy comes through.

The Court: Is Mr. Brumberger's injection into this sample picture the usual thing or exceptional?

The Witness: It is exceptional. And it will demonstrate in that he has extra specific technical data to offer this prospect, which I infer is the reason for his writing.

* * * * * *

Q. Mr. Houston, you yourself, as a sales employee, or sales officer of Nuodex, wrote directly to International Shoe here in New Hampshire in 1954; do you recall that that was so? A. I don't recall it, but it could have happened.

Q. April 1, 1954? A. It is possible, yes.

Q. Probable? A. I would say possible. I mean, if I saw the

letter. I could say more than that.

Mr. Brown: Would you gentlemen please get a copy of Mr. Houston's letter of April 1, 1954?

(Questions by Mr. Brown:)

Q. Mr. Houston, as regional sales manager during part of this period, as a top sales executive of Nuodex, do you know how Super-Adit, packaged as in this package that I show you, with the manufacturer's name Nuodex Products on the bottle and on the package, do you know how that particular item was merchandised by your company?

A. Generally, I believe I do, yes.

Q. Can you tell us, then, in what fashion that particular type of product would get onto the shelf of a local New Hampshire retail store; how would it come about?

A. The product could well have gotten into a local store, as I understand it. We sold it to paint companies.

Q. For their further distribution?

A. For their distribution, and by that very action we would lose control, naturally, over where it would end up at retail.

Q. Do you have any personal knowledge of the extent to which that item came into New Hampshire by that means?

A. No, I haven't. Only your testimony or your comments yesterday with Mr. Minich was the first I actually knew of it.

Q. As regional sales manager, you had no information passing over your desk about the extent of the sales of that pre-packaged—that is a pre-packaged item, isn't it?

A. Yes. To my knowledge, I never saw any evidence of any going directly into New Hampshire.

Q. Nobody kept you advised as to whether it was coming in, in what manner or in what amounts?

A. No. Any invoice covering the bottles would have passed through my hands, and I never saw one for a shipment into New Hampshire. I did see other invoices for Ad-It in bottles and Super-Adit in bottles going to other paint companies around.

* * * * * *

Q Did you, Mr. Houston, play any part in the service call that Mr. Galbraith made up at Great Falls Bleachery?

A. No. I had knowledge of it, but I played no part in it.

Q. You didn't make the trip?

A. No.

Q. You didn't review any of the technical data that was produced at that time?

A. I don't believe I did. I don't recall.

Q. And what about the American Twine situation; we covered that in general yesterday with you?

A. Yes, I think we did.

Q. And on that one, did you provide yourself any technical assistance other than what the labratory produced?

A. Well, as I recall it, the file was pretty self evident; got involved in dispensing and getting technical assistance out to assist the representative.

Q. Let me ask you a couple other things. With respect to the advertising of your company, are you able to tell us anything in detail with respect to what advertising is placed and how you place it? A. I think I can to some extent, yes.

Q. Can you tell us what general publications, nationally advertised publications your concern does advertise in; generally as a general operation, and I am talking about the situation back in 1954, in that period, if there is any change?

The Court: And prior thereto.

The Witness: Well, for one thing, Your Honor, I don't think there has been a great change in our policy, and we tend to use media which are so-called trade journals which reach segments of industry, or personnel in industry who allegedly would be interested in what we have to say.

Q. What journals do you regularly advertise in that are national in distribution? A. American Paint Journal.

Q. Yes. That is this little journal I have in my hand?

(Magazine shown to the witness by Mr. Brown.)

A. Yes. That is the main media. Paint, Oil and Chemical Review. I think, yes, we have in the National Painter Magazine.

Q. Yes? A. The Official Digest of the Federation of Paint and Varnish Production Clubs, the Official Digest.

Q. Any more? A. That is all.

Mr. Sanders: What's that?

The Witness: The Official Digest of the Federation of Paint and Varnish Production Clubs. Then there is the Western Paint Review, which is not national. That is more or less west of the Rocky Mountains.

(Questions by Mr. Brown)

Q. And have you indicated generally—are there others? Are you done with that listing?

A. That pretty well covers it. I might have missed one or so.

* * * * * *

Q. What does Nuodex call its anti-skinning agents?

A. Exkin 1, 2 and 3.

Q. And what, actually, are those products; what is the chemical basis for them, do you know offhand?

A. They are oxime, organic oxime, of slightly different structures.

Q. What about textile bleaching agents, do you handle those?

A. No.

Q. Textile disinfectants? A. No.

Q. What is this Nuodex 100 WD?

A. That would be described as a textile fungicide.

Q. It isn't a disinfectant, and it isn't a bleaching agent?

A. There's quite a difference. That is right, it is not.

* * * * * *

Cross Examination

(Questions by Mr. Sanders)

XQ. Mr. Houston, what has actually been your connection with the advertising program of Nuodex, let's say from 1950 until the fall of 1954? A. In 1950, being original representative, and then later original sales manager, I had a voice by way of suggestion, or possibly consultation with my superiors as to advertising. From approximately July 1, 1953, to roughly January 1, 1955, I had full cognizance

before the fact of the general type and approach to advertising, although the advertising promotional manager is charged and has been with the responsibility for the final preparation.

XQ. Now you have told Mr. Brown about certain national magazines in which Nuodex has regularly advertised. Has Nuodex regularly advertised in the American Paint Journal; Paint, Oil and Chemical Review; National Painters Magazine; and the Official Digest of the Federation of Paint and Varnish Production Clubs, throughout the entire period from 1950 to the fall of 1954? A. I can't say that for certain. That is a little different question. In the paint journal, definitely yes.

XQ. Well, I only mentioned paint journals.

A. You mentioned four. I said the American Paint Journal, definitely yes for the whole period.

XQ. We will take them up one at the time, then. From 1950 to the fall of 1954, how regularly has Nuodex advertised in the American Paint Journal?

A. I can't—it is hard to define. I am not being evasive, but it might be every other week for a year, or every month for a few months, and back to every other month, and back and forth. Actually, when I am thinking of the term of 1950, we have advertised regularly, to my knowledge, all five during that period. I am pretty sure.

XQ. Let's clarify this. Would you say that in the American Paint Journal you have advertised Nuodex products in practically every issue from 1950 to the fall of 1954?

A. No, sir, I wouldn't say that. That is a weekly.

XQ. That is what? A. A weekly? And I would say no, we have not.

XQ. All right, tell us in your own way, then, to what extent you have advertised I will rephrase the question.
You go ahead and tell us in your own way the extent to which you would say Nuodex has been advertising its products from 1950 to date in the weekly trade journal called the American Paint Journal?

A. We have advertised regularly with varied frequency in that publication.

XQ. It is a weekly, right? A. It is a weekly. In that period.

XQ. Is it fair to say that you have so advertised in about every other issue over the period I mentioned?

A. I don't think that is correct.

XQ. Would you say in about every third issue?

A. That might be possible.

XQ. Have any of you gentlemen who were here today from New York and New Jersey any of your records concerning the extent to which you have advertised in nationally distributed magazines; have any of you gentlemen here, as far as you know, got any records which will help us to make this more exact? A. I have not. I do not believe anyone else has.

XQ. Of course you do have somewhere, don't you, a complete advertising file which would clearly answer all these questions I am directing to you?

A. We have a promotion manager.

XQ. Is he here today? A. No.

XQ. Was he here yesterday? A. No.

XQ. Let's continue, then. Now over the same period of time, how frequently has Nuodex advertised in the nationally distributed journal Paint, Oil and Chemical Review?

A. I would guess that it averaged every month.

XQ. And is this magazine a monthly?

A. It is, sir.

XQ. Over the same period of time, how frequently would you say Nuodex has advertised in the National Painters Magazine?

A. Again, an estimate of every two to three months.

XQ. And how frequently is the National Painters Magazine published? A. Monthly.

XQ. Over the same period of time, how frequently has Nuodex advertised in the Official Digest of the Federation of Paint and Varnish Production Clubs?

A. Every month, I think.

XQ. And is that a monthly? A. Yes, sir.

XQ. Now have you ever by chance given any study to the distribution of these four magazines we have discussed?

A. Yes, we have.

XQ. And you know it to be a fact, don't you, that every single one of these magazines that we have discussed has some distribution in New Hampshire?

A. I don't know that. I could conceive of it being so, certainly.

XQ. Why do you say that? What leads you to do that?

A. I don't obviously control their mailing list.

XQ. Well, why do you conceive it to be so?

A. I believe there are people in New Hampshire who make paint, and presumably they would have interest in these publications, some of them.

XQ. In some of these publications, actually they go to retailers selling paints, don't they?

A. Yes; for example, National Painters.

XQ. I said retailers selling paints, hardware stores and so forth? A. I would say no, I don't know that.

XQ. Now you have told us that Nuodex has advertised in these certain paint journals. Now Nuodex actually has advertised in trade journals out of the category of paint and varnish journals, hasn't it? A. I don't understand that question.

XQ. Directly, then, you have advertised in textile journals, haven't you? A. That is possible. I am not certain of that, but it is possible.

XQ. Well, we would like to talk, if we can, in terms better than possibilities. We would like to talk at least in terms of probabilities. A. I don't know for a fact if we advertise in textile journals, although it is possible. I don't think it is recent, if it was the case.

XQ. Can anyone here tell us any more exactly how you advertised than you yourself can? A. Mr. Clark might augment in more detail, more specifically.

XQ. About advertising? A. About advertising, and the con

tention of paint industry effort.

XQ. All right. What other journals or media other than these paint and varnish journals we have discussed has Nuodex, since 1950 to date, advertised to your knowledge?

A. Well, those came quickly to memory. I am not sure I can add to it. Let me think. Yes, there is, I think, the Paint Industry Magazine. You could put that down, too.

XQ. And to what extent over the period 1950 to date has Nuodex advertised in that? A. I think we ran about three or four ads in one of those years.

XQ. And how frequently does that magazine come out?

A. Monthly, I believe. Monthly.

XQ. And similarly, from your knowledge of the field of advertising, does this periodical have some distribution in New Hampshire? A. I would expect that it might.

XQ. Now does there occur to you any further paint or varnish journal in which Nuodex has advertised during this period?

A. No, there does not.

XQ. Do you recall Nuodex ever advertising in Paint and Wallpaper Dealer? A. I don't recall it, but it is possible.

XQ. Do you have any recollection of it?

A. No. I have none.

XQ. Do you have any recollection of Nuodex advertising in a magazine called Paint Industry?

A. I just mentioned that, sir.

XQ. Well, what did you call it?

A. I think I said Paint Industry Magazine.

XQ. You just mentioned it? Under what title did you just mention it? A. I believe—

XQ. Actually, the magazines you have mentioned are as follows: American Paint Journal, No.1; Paint, Oil and Chemical Review; National Painters Magazine; the Official Digest of the Federation of Paint and Varnish Production Clubs; and finally you thought of a fifth one, and that fifth one was what? A. I mentioned the

Western Paint Review also. And in later questioning I said Paint Industry Magazine, maybe three or four times in one year.

XQ. Do you know whether Nuodex is carried as a regular advertiser in the advertising index of Paint Industry?

A. I know we are.

XQ. And do you know that you have been listed as such in the advertising index of this magazine from 1950 to the present time? A. Yes.

XQ. Now are you in Nuodex practically contantly sending directly by mail to your customers advertising post cards, pamphlets and brochures concerning Nuodex products?

A. I would not say practically constantly, no.

XQ. Well, very frequently? A. No, sir, I wouldn't say that.

XQ. Well, tell us in your own way, then, the extent to which Nuodex originates advertising media which can either be handed to a customer or mailed to a customer?

A. As an adjunct or marketing efforts through our representatives for mildew, it became apparent that further augmentation of the effort through certain little phamplets of various types might assist the whole program. So those were prepared and duly made available through the chain of distribution we discussed many times. And they were made available. They might again. It is the manner in which we do business.

XQ. Do you have your own printing jobber who is constantly getting out Nuodex brochures, materials, post cards?

A. When we have work done of a promotional nature, it is done by, I presume, several printers. We have no one constantly available.

XQ. Now when you mail out from Nuodex the advertising material we are now discussing, how do you determine to whom to mail it? A. We have a mailing list.

XQ. And how is that mailing list made up; how do you keep it up to date? How did you create it in the first instance?

A. I am just trying to remember if it is by industry or territory. I think it is by territory, which means one of our

representatives' area of operation, and I believe we have a key to industry, too. And it is one of those things that was there when I got there. We have tried to improve its accuracy by mailings and what have you.

XQ. Now whenever a product is actually sold by Nuodex to a customer, does that customer go on its mailing list?

A. Generally, yes.

XQ. And whenever a person or a corporation merely writes in to Nuodex or to a sales representative and in turn the matter is passed on to Nuodex seeking just general information, do you endeavor to put the name of that inquirer, a possible customer, on your mailing list?

A. No.

XQ. In any instance in which a person has requested some of your literature, whether brochures or pamplets, do you add that person's name to your mailing list?

A. You said, "in any." In some we do, and some we don't.

XQ. Whenever you have sent out a sample of your product to a person who has inquired for it, do you add the name of the recipient of the sample to your mailing list?

A. No, not necessarily.

XQ. If, for instance, one of your sales representatives reports to you that he has not actually made a sale to a certain outfit but that that outfit in the future might have needs for your products, would you add the name of such a prospective customer to your mailing list?

A. Yes.

XQ. Now first of all, I want you to tell us in your own way how frequently, if you can, your people, that is Nuodex, are mailing out phamplets or brochures or post cards to everyone who is on the Nuodex mailing list?

A. I mentioned earlier it is broken down by industry. And the only time everyone on the list would get a mailing from us would be a price list, a new price list, change of price.

XQ. And that occurs how often?

A. In no regular pattern. About once a year. It seems to go up or down.

XQ. From 1950 to date, have you released quite a tremendous volume of brochures, pamphlets, post cards, concerning first Ad-It and later Super-Adit?

A. Well, I don't think so, I mean, quite a tremendous is very relative. I don't think so. We have had many pieces relating to it. I don't think it was quite tremendous.

XQ. Would you say over the period I mentioned that you have released something in Ad-It in earlier years, and Super-Adit in later years, something about once a month?

A. To whom were you talking about?

XQ. I haven't said to whom. I am asking you if you printed it up? A. I don't think we print it up in the magnitude of once a month, no.

XQ. Would you say once in two months, then?

A. You would almost have to tell me to whom you are talking this would go to, because it is difficult for me to assess it.

XQ. Have you, from 1950 to date, printed up and sent out to all those persons on your mailing list who would in any way use or sell paint, advertising media such as I have described, doing that practically every month?

A. Since 1950?

XQ. Yes? A. It might have averaged every two months, or three, I am not certain. But it could have been in that magnitude.

XQ. Can you give us a better estimate than every two or three months? A. I don't think I could, really, sir.

XQ. By the way, can you tell us approximately when Nuodex ceased production of Ad-It and commenced production of Super-Adit? A. Mr. Clark would be able, better able to answer that than I, sir.

XQ. Well, is it around 1942 or 1943?

A. No, no.

XQ. 1952 or 1953, excuse me? A. I believe it was around 1952, 1953, that we switched, yes.

XQ. Is it fair to say that when the switch occurred, that since the switch, Nuodex has been mailing out to all persons or corporations on its mailing list advertising material con-

cerning Super-Adit about once every two or three months?

A. Very possible, yes.

XQ. Well, is that probably the situation?

A. Probably the case, every two or three months. I think probably that is a fair statement.

XQ. Now in the advertising that has been sent out by Nuodex concerning Super-Adit which we have just been discussing, to what extent does the advertising show or set forth the name of the sales representative of Nuodex?

A. I think that might be too much of a generalization, Mr. Sanders, because it depends on the segment of the market for whom the piece was prepared; the efforts we make or seek to accomplish with this merchandising business.

XQ. I am talking about Super-Adit?

Mr. Sulloway: Let him finish.

(Questions by Mr. Sanders)

XQ. I am talking about Super-Adit advertising.

A. Yes, Super-Adit.

Mr. Sulloway: I thought he didn't finish his answer.

The Witness: The effort we undertook with all these things we are talking about here, Super-Adit production and one sort of another, are all geared to reinforce the potential for the product of our representatives to paint manufacturers. One piece, from where we sit, one piece might be ideal thinking for the master painter, another for the paint manufacturer, salesman, and so on down the line. The emphasis we make on our representatives would relate to the class of trade for whom the piece is prepared.

XQ. Would you mean to say in some instances the identity of the sales representative would be set forth in the advertising and in other instances it would not be so?

A. I believe so, yes.

XQ. How do you get to master painters?

A. How do we get to them?

XQ. Yes, how do you get your advertising to master painters?

A. I mentioned the National Painters Magazine. That would

be the primary point. To my best belief, though, every bit of advertising we did there, or anything with the master painter, the paint companies were aware of and apprised of, usually, in advance of this effort.

XQ. Do you have the names of any master painters on your mailing list? A. I don't think so, no.

XQ. Is this mailing list actually a series of lists split up by industry and also territorially?

A. I said earlier I wasn't sure. We can tell either way. We have territory, and we have industry tags. Now whether they are segregated or not, I couldn't tell you for sure. But we can break it either way.

Q. Where is this? A. The list is located at Newark, New Jersey, our general offices.

XQ. Have any of you people got a copy of that list here today?

A. No, sir, I don't believe anyone would have it with them today. I might add it is about twenty-eight drawers of cards and so forth.

XQ. Is the list made up of a lot of index cards in a huge filing cabinet? A. No. You know what an addressograph plate is.

XQ. Yes? A. It has an imprint of a plate on a card, and these plates are in drawers, and the drawers are marked, as I said, by territory or industry. I am not certain if with the territory we have tags indicating which industry the particular plate would apply to.

XQ. What territory would New Hampshire be?

A. New Hampshire is construed as being part of our New York, New England territory.

XQ. Now has Nuodex, to your knowledge, since 1950, ever advertised in newspapers? A. I think, I am not certain, I think, I don't know whether it was 1950 or 1949, we might have run an ad in the New Orleans paper at one time.

XQ. Did you ever run any ads in any Boston newspapers?

A. Not to my knowledge, no.

XQ. Now has Nuodex ever employed radio advertising?

A. Not to my knowledge.

XQ. Have you examined in the recent past this so-called mailing list with reference to New Hampshire listed persons or corporations? A. No, I haven't.

XQ. How much of a chore would it have been for you to in some way determine the extent, number and identity of New Hampshire corporations or persons on these mailing lists?

A. Well, from the amount of our business, I would guess a very minor chore.

XQ. Well, all right, now what would you have gone through to do it? A. Well, I personally would have simply asked for a list of cards with the plates imprinted of any plant that had a New Hampshire location.

XQ. And you would have gone both to your industry and territory divisions to do that? A. That would have been done, and cards would have been, presumably would have been complete.

* * * * * *

XQ. Now, Mr. Houston, do you recall that in 1952 or 1953 Nuodex had considerable trouble making collections from Milford Paint? A. I wouldn't say considerable. I recall in the light of correspondence I just looked at, I saw a couple of credit letters to them. In that light I say apparently we had some trouble.

XQ. Do you recall that you sought and obtained the assistance of Litter Company employees in interviewing Milford Paint in endeavoring to get Milford Paint to pay up on a check that bounced? A. I don't recall that, no.

XQ. I might say that I am referring to the file which you just gave us for examination.

Mr. Sanders: If you will bear with me a little, Judge, I will try to get this in chronological order.

(Questions by Mr. Sanders)

XQ. Would you tell me again who W. H. Hawkins was in your organization in the spring of 1953?

A. He is not in our organization. Mr. Hawkins is, and I

believe then, was credit manager of D. H. Litter Company.

XQ. I see, A. In New York.

XQ. Well, who was L. W. James in the summer of 1953?

A. He is the credit manager for Nuodex Products Company, and was.

XQ. Now, I show you a copy of a letter dated August 31, 1953, from Nuodex Products Co., Inc., by L. W. James to Milford Paint Works.

* * * * * *

XQ. Do you recall Milford Paint became indebted to Nuodex in a fairly substantial amount in 1953?

A. Well, yes, in the light of this correspondence I have just seen today and yesterday.

XQ. And what, if any, assistance did Nuodex request Litter Company representatives to give in connection with the collection of this Milford indebtedness?

Mr. Sulloway: If this witness knows about anything of that sort. The witness Mr. Johnson, I think he has testified to it in his deposition just what was done.

(Questions by Mr. Sanders)

XQ. You take this file, go through it, and then you can answer my questions.

(File handed to the witness by Mr. Sanders.)

Mr. Sulloway: If he personally had anything to do with it, that is one thing.

The Court: What you are asking to do is evaluate the file isn't it, Mr. Sanders?

The Witness: I mean, without a study, I don't know of any instance that we asked our representatives to do anything. Now I see here some routine, so-called, dunning letters that our credit manager wrote.

(Questions by Mr. Sanders)

XQ. Look in there and see if you see any routine call reports from Mr. Johnson to Nuodex in which Mr. Johnson reports to Nuodex that he has seen Mr. Fletcher of Milford Paint and discussed with him paying up this indebt-

edness?

A. Well, for example, our credit manager on August 31 wrote in reference to the fact that he was hoping to have had a check by now.

Mr. Sullaway: Wrote whom?

The Witness: Wrote to Milford Paint Works, Milford New Jersey—Milford, New Jersey? There must be a boner here, but presumably it went there. That letter was dated August 31, 1953. Mr. Johnson made a contact September 22, 1953, where he called on Mr. Fletcher at Milford Paint Works, Milford, New Hampshire to discuss past due bills. Has cut down payables by two-thirds this past year, but still slow.

Mr. Sullaway: Have you read the whole of that memorandum?

The Witness: No. Then he said order all following that, he said order Alcoa 205, Nuodex driers and Apco thinner. Will send Alcoa booklet on testing Aluminum paint per form answer. That is the total salesman's report.

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XQ. Now we were discussing, I must say without too much sequence, the past due account of Milford Paint before recess. Now to what extent were you accustomed to utilize the services of your sales agents in general—I am not confining myself to Litter now, but in general—effecting collection of overdue accounts? A. The collection of accounts receivable has been handled through our accounting department directly as far as the collections go with whomever owed us the money, but always apprising through copies of correspondence the affected individuals with Nuodex or within our manufacturer's representatives organizations.

XQ. All right. Would Nuodex on occasions request the assistance of the sales representative in trying to collect an overdue account? A. I don't think so.

XQ. In particular, do you recall anyone in Litter Company ever being asked to call King Company to try to get pay-

ment of an account that may have been a little overdue? A. No.

XQ. Do you recall ever seeking the assistance of the Litter Company in endeavoring to collect an account which was overdue from Milford Paint? A. No, sir.

XQ. Now I am referring to the material which is in this file which was produced this morning by Mr. Sulloway and which is labeled 1954 correspondence, Litter Company. Now I wish you would refer to it, you will find everything arranged chronologically now; will you please refer to a letter dated August 31, 1953, from Nuodex to Milford Paint? (File handed to the witness by Mr. Sanders.) A. Here we have it.

XQ. Now would you read, and not too fast, please, would you read into the record the letter of August 31, 1953, to which I have just referred? A. Dated August 31, 1953. Milford Paint Works, Division of Windsor-Embassy Chemicals, Milford, New Jersey. "Gentlemen: On May 14, 1953, we wrote advising you of a past due item in your account with us.

"We had hoped by this time to acknowledge with thanks the receipt of your check. Instead, we find it necessary to again direct your attention to this past due amount and advise that unless your check is received in this office by September 8, 1953, we will be obliged to refer your account to our attorneys. Yours very truly, Nuodex Products Comany, Inc. L. W. James, Credit Manager."

XQ. What appears at the bottom? A. LWJ jc. Registered mail. Return receipt requested. Carbon copy, Litter.

XQ. Meaning what? A. I presume a copy was sent to Litter also. And B.L.R., which would be the initials of Mr. Reiter, whom at this date I believe was our comptroller.

XQ. So a copy went first to Litter Allston and Reiter, too, who was then your comptroller? A. Yes, sir.

XQ. You were acquainted with call reports that salesmen make to the sales representatives; that is, in general you are familiar with the fact that such call reports are made?

A. Yes.

XQ. Now would you please refer to the memo please refer to the salesman's report dated September 22, 1953. That is a report from what salesman? A. The salesman is Herb Johnson.

XQ. And according to this report, he called on whom? A. Milford Paint Works, Milford, New Hampshire.

XQ. And whom did he see? A. Mr. F. H. Fletcher.

XQ. Now would you read into the record, not too fast, would you read into the record the report of Mr. Johnson under this date? A. "Discussed past due bills. Has cut down payables by two thirds in past year, but is still slow. Ordered Alcoa 205, Nuodex driers and Apco thinner (drums)." I believe that is what that says. "Will send Alcoa booklet on testing Aluminum paint performance."

XQ. Now would you refer to a letter of November 23, 1953, from Nuodex to Milford Paint? And would you read that letter into the record? A. "November 23, 1953. To Milford Paint Company, Division of Windsor-Embassy Chemical Company, Milford, New Hampshire. Attention: Mr. F. H. Fletcher, president. Dear Mr. Fletcher: An expression from you regarding your long past due account has not been received since your check of September. From the age of your account, the balance being $169.30, we feel certain that we have been most patient and considerate with you. We are advising you that unless your account is placed in balance within ten days of the date of this letter, we will be obliged to take more drastic action. Trusting that this action will be uncessary, we are Very Truly Yours, Nuodex Products Company, Inc. L. W. James, Credit Manager."

XQ. And carbon copies went out to whom? A. Carbon copies, Litter-Allston; Litter-New York; W.J.H.

XQ. And who is that? A. Myself. F.X.D.

XQ. And who is that? A. Mr. Dwyer. B.L.R.

XQ. Who is that? A. Mr. Reiter.

XQ. Now would you refer to a longhand memorandum from

W.H.H., addressed to Boston, dated November 24, and before I have you read this into the record, do you know who W.H.H. is? A. May I read it first?

XQ. Yes, sir. (Memo handed to the witness by Mr. Sanders.) A. I guess—I would guess in view of the total picture here that W.H.H. is Warren H. Hawkins.

XQ. Of what company? A. D. H. Litter Company.

XQ. And this memo is addressed to the Boston office, apparently? A. Yes, apparently.

XQ. And would you read into the record slowly this longhand memo from Mr. Houston to the Boston office of Litter Company? A. I'm sorry, that was from Mr. Hawkins.

XQ. I'm sorry, what did I say? A. Houston.

XQ. Hawkins, of the Litter Company? A. "Please contact Fletcher and demand a certified check." He has ck here, check. "Do not release any more materials for any principal. We do not want to extend credit to accounts like this. Nuodex Products have threatened to take attorney action. See copy their letter." Some of these words were abbreviated.

XQ. See copy their letter what day? A. 11-23.

XQ. Have you just read in the record the letter of 11-23? A. I have. W.H.H. is the signature.

Mr. Salloway: What year was that?

Mr. Sanders: All in 1953.

The Witness: There is nothing in writing about 1953 here, but the date stamp from Boston would infer it.

* * * * * *

XQ. Now I show you, Mr. Houston, National Painters Magazine issued in September, 1953, and ask you to take a look at the Nuodex ad appearing on page five of this?

* * * * * *

XQ. Have you looked it over? A. Yes, sir.

XQ. Is the Super-Adit ad which appears in this issue of this magazine typical of the Super-Adit ads that have been put out in these nationally distributed magazines we discussed this morning from 1950 up to the present time?

A. No, sir, it isn't. I can't say that.

XQ. Well, when you advertise Super-Adit, would you in general employ full page ads in these magazines? A. Yes, in the trade papers, we would in general use full pages, yes.

XQ. And would you try to have, if possible, some kind of an illustration taking up, say, a quarter or a third of the page? A. Not necessarily, no.

XQ. Would you frequently use some kind of an illustration? A. Yes.

XQ. And would you use the term, or place the term "Super Adit" in bold type at least in one place in the ad? A. Not necessarily.

XQ. And would the ads of Super-Adit always have somewhere in the ad Nuodex, Nuodex Products Co., Inc., Elizabeth, New Jersey, plants in Elizabeth, New Jersey, Newark, New York, Long Beach, California, and throughout the world? A. Yes, it would always refer to Nuodex Products.

XQ. And give the address of Nuodex? A. Give the address of Nuodex. The address of plants might not or might be.

XQ. I notice that in this particular ad, and I hadn't actually noticed it before, that the term or the language, "A subsidiary of Heyden Corporation" appears here. Nothing like that would have appeared before, say, the summer of 1954, would it? A. No.

XQ. Aside from the statement of the subsidiary connection, would the Super-Adit ads in general have been more or less like the Super-Adit ad in the magazine I am showing you? A. No, they wouldn't.

XQ. Well, tell me how they differ in your own way? A. I mentioned earlier the class of trade. That is the key to this thing, and the Painters Magazine is not typical of the class of trade with whom we work with as products. Our advertising is gauged to achieve beneficial reaction with the segment of trade to whom we are directing it. So that is why I cannot generalize with National Painter and other publications.

XQ. I am not asking you to generalize the publication. I am asking you about the ad, sir. A. Well, as I said, sir the direction taken in that ad need not necessarily be typical of all other ads we had of Super-Adit. In my opinion, it is not.

XQ. In this ad, what directs it to the master painter? A. The media.

XQ. I didn't ask you about the medium of circulation. I am asking you about the substance of the ad. A. All I can tell you is bowing to the professional ability of our promotional people, the ad is in the National Painters Magazine.

XQ. You have told us that a number of times this morning and this afternoon. I understand that you have told us this magazine goes to a considerable number of master painters throughout the United States. I wasn't inquiring as to the eventual recipient of this magazine. I was merely inquiring of you aside from the subsidiary statement herein contained, this ad was in general typical or a good example of the Super-Adit ads you have published since you have used Super-Adit from 1950 to, say, to date; not talking about who gets it. A. I know you are not, sir, but the answer would still be no, not necessarily.

XQ. Is it a typical ad of a good many ads, then, that were run between 1950 and the present time? A. Yes.

XQ. All right. And of course would you use the exact same language in ad after ad as appears in this particular ad, you wouldn't use exactly the same language and the same sentences? A. No.

XQ. You would vary those? A. Yes.

XQ. In general, would you encompass the factors of Super-Adit as set forth in this ad in one fashion or another? A. Yes, we would, among others.

Mr. Sanders: We offer the ad.

(Handed to Mr. Sulloway by Mr. Sanders.)

Mr. Sulloway: As long as you haven't been able to find one earlier than before this, 1954.

Mr. Sanders: Not yet.

Mr. Sullaway: Well, if it is understood, Your Honor, that this business about Heyden Chemical Company in here, if that is deleted from the record, I have no objection, is that right, that may be?

The Court: You can't delete it very well. You mean disregard it, is that what you mean?

Mr. Sullaway: I don't know whether it is ever going to be printed again. Of course it is on the plaintiff's attorney's statement, he isn't trying to introduce anything about this company being a subsidiary of Heyden Chemical Company, and I want it understood that if this exhibit is admitted that it is understood that the reference to the Heyden Chemical Company is entirely immaterial in this case. May that be understood?

* * * * *

Well, then, as I understand it, Your Honor, that insofar as any reference of Heyden Chemical Company, it is immaterial?

The Court: Insofar as this offer is concerned.

Mr. Sullaway: Yes.

The Clerk: Received and marked Defendant King Exhibit AA.

* * * * *

XQ Now is it now, and has it always been, the purpose of such advertising as Nuodex has done in reference to its products to create an interest in and a demand for such products on behalf of the public? A. No, that is not true.

XQ What is the purpose of your ads? A. To promote the sale of our products.

XQ All right. A. Which well, let it go there.

XQ Would you agree that the purpose of the advertising which Nuodex conducted is first of all to create an interest on the part of the public in Nuodex products? A. I must take exception to the part of the public, sir, because we don't sell to the public. We sell to an industrial class of

trade. Mr. Minich developed this in his testimony.

XQ. Mr. Houston, has it been the purpose of Nuodex advertising to create an interest on the part of such segments of the public as might be using your product? A. In a minor instance, yes. Generally, no.

XQ. Look, Mr. Houston, the purpose of your advertising is to create an interest in your products by anybody who might be a user for the same, isn't that so? A. Yes, sir, that's right.

XQ. All right. And similarly, to create a demand by anyone who conceivably could have a use for your product; isn't that so? A. Yes, that is so.

XQ. Now we discussed before lunch the card system which you use at the home office in connection with your mailing list. *Mr. Sanders*: And would you, Mr. Sulloway, produce the cards which the witness has testified were taken out of the addressograph system?

(Cards handed to Mr. Sanders by Mr. Sulloway.)

(Questions by Mr. Sanders:)

XQ. First of all, did you personally go through the addressograph system to take out these cards? A. No, sir.

XQ. Who did? A. I understood during the recess that a clerk in our mailing department had them prepared. I did not know this morning that they had been. But I have seen them.

XQ. Who gave the clerk the instructions? A. I believe Mr. Reiter.

XQ. Were you present when the instructions were given? A. No, I wasn't.

XQ. Do you find any card for the American Twine and Fabric Company, Portsmouth, New Hampshire, which previously has been discussed in testimony? A. No, I do not.

XQ. What is the first alphabetical card you find? A. Mr. Clyde Bishop, Milford Paint Works.

XQ. Do you find any card for Great Falls Bleachery? A. Yes.

XQ. Let's put that in order, then, where it belongs. You do find

a Great Falls Bleachery on your mailing list? A. Yes.

XQ. Do you find any card for Hampshire Manufacturing in Nashua, which also has been discussed by Mr. Johnson? A. No, I do not.

XQ. Do you find a card for H. & H. Chemicals? A. Yes, I do.

XQ. International Shoe in Manchester? A. No.

XQ. Johns-Mansville? A. Yes.

XQ. Judson Dunaway? A. No.

XQ. In Dover? A. No.

XQ. Manchester Narrow Fabrics? A. No.

XQ. Milford Paint? A. Yes.

XQ. Miljo Chemical in Exeter? A. Yes.

XQ. Nashua Corporation? A. Yes.

XQ. New England Cable? A. No.

XQ. New England Paint? A. No.

XQ. Putnam? A. Yes.

XQ. Resin Research? A. Yes.

XQ. Simplex? A. Yes.

XQ. Tintomatic in Goffstown? A. No.

XQ. Are the cards which have been produced here the original cards which are taken right out of the file, or just run off some new cards? A. I think this is a combination of new cards run off from the plates, and some copies from reproductions of those plates.

XQ. For instance, Great Falls Bleachery and Dye Works, Somersworth, New Hampshire, is all that appears on this first alphabetically? A. Yes.

XQ. Now, is that all that appears on your master card? A. I would say yes, that is all that appears, to the best of my current knowledge.

XQ. Did you tell us earlier that your cards were filed both territorially and by industries? A. I said I wasn't sure of which, but by the plates we were able to differentiate between industry and territory on the plates.

XQ. What? A. I think I said earlier that we were able to differentiate with a given plate as to which industry and

which territory it was in.

XQ. Look, in your file cases at your home office, do you have these cards all over the United States, segregated first by industries, second, the same cards in some way segregated by territory? A. No, sir, I think I said earlier I believe they are segregated by territory, but that we can determine through tags or otherwise industry.

XQ. Did you ever look at this file? A. I have. Not recently, though.

XQ. Well, are these cards segregated by territory, to start off with, or the whole United States in there alphabetically? A. I said I believe they are segregated by territory.

XQ. Then if you don't know, it is all right. But do you know in what territorial segregation the originals of these cards are kept? A. Of these particular cards?

XQ. Yes? A. They would be in the Boston territory; the New England territory, as we define it.

XQ. All right, tell us what states those are? A. Massachusetts, New Hampshire, Vermont, Maine, New York State, north of Harmon and east of a point a few miles to the west of Schenectady, and Connecticut to approximately New Haven, that is a line drawn through New Haven, a north-south line drawn through New Haven, and an east-west line drawn through Hartford, roughly that half or three-quarters.

XQ. Now if you are right in your recollection, are the cards in this territorial section you have just described arranged alphabetically? A. By company alphabetically, I believe.

XQ. By company alphabetically? A. Yes, sir.

XQ. How many such boxes do you suppose you have covering this particular territory you have just described? Maybe I should say drawers instead of boxes. A. I could only guess. I might say three or four drawers, possibly, something like that.

XQ. Probably a foot and a half long? A. I think so, yes.

XQ. And you can't help us at all, then, from personal obser-

vation as to the thoroughness with which these boxes were gone through containing the cards in the territory you have described?

A. No, not by personal observation.

Mr. Sulloway: Are you going to put them in, Mr. Sanders? I have produced them for you. Are you going to mark them, put them in?

Mr. Sanders: You may inquire.

Mr. Sulloway: You asked me to produce them. I will ask to have them marked.

The Clerk: Received and marked Nuodex Exhibit B.

(Questions by Mr. Sulloway)

XQ. Mr. Houston, you have described the situation whereby some orders come through the Litter organization to New York, and some may come directly from the customers to New York. Whatever is done with those orders and the filling of those orders is done entirely outside of New Hampshire and either from New York or New Jersey or Massachusetts, is that right?

A. Yes, sir.

XQ. Have you as sales manager, or in any position that you were in during this period, ever come into New Hampshire to interview customers to get sales?

A. No, sir.

XQ. And in all the years that you have been connected with the company in that capacity, that is true, is it?

A. Yes, sir.

XQ. And in that whole period, has anybody from the office of the Nuodex Company, New York, come to New Hampshire except one Mr. Galbraith on a trip to the Great Falls Bleachery which has been referred to?

A. No.

XQ. Now are you familiar with how Mr. Galbraith happened to come to New Hampshire in connection with a matter that arose at the Great Falls Bleachery?

A. I believe so, yes.

XQ. Well, will you tell the Court how that started and what the occasion was?

* * * * * *

XQ. Were you familiar with what started the trip of Mr. Galbraith to Somersworth?

A. I believe so, yes, sir.

XQ. And what did start it?

A. There was a company in Massachusetts who encountered some difficulty with one of our products, and our representative apprised us of the situation, which he felt needed some reinforcement by our company.

XQ. And when you refer to your representative, you are referring to the Litter Company?

A. Yes, sir.

XQ. After being apprised of this difficulty that somebody in Massachusetts was having with one of your products, did you learn it had reference to a sale by, or something done by the Great Falls Bleachery for that customer?

A. I'm sorry, I didn't understand it.

XQ. Did you learn that the matter in question had to do with something that came to that customer in Massachusetts from the Great Falls Bleachery?

A. Yes, sir, that is correct.

XQ. Now as a result of that, do you know what was done in view of that matter which came up and was referred to the company?

A. Well, I believe our regional manager at that time dispatched Mr. Galbraith to be of assistance to our representative the Litter Company in Boston and that subsequent to their work in the account in Massachusetts, it being apparently expedient to come to New Hampshire.

XQ. You were not there in New Hampshire, so you don't know exactly what happened there?

A. No, sir.

XQ. Do you know that Mr. Cookingham was there?

A. Yes, sir, I do.

XQ. And so far as you know, that was the only occasion that

anybody ever come into New Hampshire to service or to do anything about any account in New Hampshire?

A. Yes, sir.

Mr. Brown: That is other than the Litter Company people, Mr. Sulloway.

Mr. Sulloway: I mean from the company in New York.

Mr. Brown: Oh, yes.

(Questions by Mr. Sulloway)

XQ. And were any approaches to customers in New Hampshire made by anyone, other than possibly by mail from New York, by anybody personally except the employees of the Litter Company?

A. I don't think so, no, sir.

XQ. And in every case of a sale attained by an employee of the Litter Company, when the order is filled, I think you made some statement, does that complete the matter; is there something further that happens after an order is filled?

A. Well, commission is paid to the representative who got the order.

XQ. You mean by that the Litter Company?

A. Yes, sir.

XQ. And is it a fact that whether the sale or the order came from the Litter Company by mail or directly in some form from the Litter Company or whether it came directly to the New York office from New Hampshire that the commission for that sale was paid to the Litter Company?

A. That is correct.

XQ. And I think, as appears from the files that have gone in, whenever any order came directly to you in New York, to the company in New York, from anybody; did you immediately notify the Litter Company of any such order?

A. Yes.

XQ. Now in reference to some questions to you by Mr. Sanders about the advertising, I think you have stated that you don't make sales directly to the public. Who are the customers that the Nuodex Company deals with in New

Hampshire?

A Well, they are all industrial and paint manufacturers. And in the case of Great Falls, I guess it is a bleachery or textile processor.

XQ Do you make any sales, to the best of your knowledge, directly to any retailer? Anywhere?

A No.

XQ With reference to the employees of the Litter Company, do you have any control of the hours of work or labor or anything else that those employees are working under?

A No, sir.

XQ Are they paid by you in any way?

A No, sir.

XQ Do you have any representative of your company that resides in New Hampshire?

A No, sir.

XQ Do you have any property in New Hampshire?

A No, sir.

XQ Do you have any telephone registration in New Hampshire, or listing?

A No, sir.

XQ Now have you personally gone over all of these invoices of sales from companies or customers in New Hampshire to determine the number of sales in each year from 1952, inclusive up through 1955, up through May 5, 1955, and have you added up the amounts of the total sale so that you can present a table which you will verify showing just what the sales were in each year to each of your customers in New Hampshire, and the amount thereof?

A I can.

* * * * * *

The Court: Do you wish to have it marked as an exhibit?

Mr. Sullaway: Yes.

The Clerk: Received and marked Nuodex Exhibit C.

Questions by Mr. Sullaway:

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XQ. Now can you tell the Court how the amount of those sales, as recorded in that exhibit, compares in general with the total sales of the Nuodex Company over the five year period?

A. It is in the magnitude of two or three hundredths of a per cent.

XQ. How much of the total sales of the Nuodex Company in general?

A. That is what they represent, sir.

XQ. I am saying over the whole country, all of their sales, how much in dollars, how many millions?

A. Approximately six and a half. In some years eight, as high as eight in others.

XQ. Can you tell the amount of sales of Nuodex Products in New England on the average each year in this territory of which New Hampshire is a part?

A. Approximately two hundred and fifty thousand dollars.

XQ. It appears in this tabulation that there is no reference to the Manchester Narrow Fabric Company which has been referred to. Were there ever any sales received from that company?

A. I don't know of any.

XQ. And there is reference to Tintomatic Company down there, do you know of any sales from that company during this period?

A. No, sir.

XQ. I see in here the New England Cable Company is registered. Were there any sales to that company during these years?

A. No, sir.

XQ. And there is reference to Tintomatic Company down there, as having been contacted. Were there any sales to that company during these years?

A. No, sir.

Mr. Sulloway: That is all, sir.

Redirect Examination

(Questions by Mr. Brown)

Q. Just a couple of things, Mr. Houston. With respect to International Shoe, although you didn't sell them, you of course wrote them trying to sell them under date of April 1, 1954 didn't you?

The Court: I didn't get that. I guess I missed that question. Read it.

(The last question was read by the reporter.)

The Witness: Yes, sir, as evidenced by the letter which came as a result of an ad, by the way.

(Questions by Mr. Brown)

Q. By the way, what publication was that ad in?

A. Industrial and Engineering Chemistry.

Q. And that is a publication in which you inserted an ad for nationwide distribution, right?

A. I think I might have been in error, sir. It could well have been an announcement of the product in this magazine, because as I said earlier, I don't know of an ad that ran in this magazine.

Q. In any event, as a result of your publicity and advertising program generally, a New Hampshire concern was prompted to get in contact with you from New Hampshire, right?

A. Yes, sir.

Q. And you, as a good sales manager, went right to work on it and got directly back in touch with them, correct?

A. We handled the thing in a routine manner to give the man what he wanted.

Q. And sent in all the technical information and description of the product in which he was interested?

A. Yes, we did.

Q. And how long did it take for the Litter representative to get around and follow up on the scene on that particular contact?

A. Well, the letter is dated April 1, and the first evidence I have here of a contact is November 1.

Q. 1954?

A. Yes, sir.

Mr. Brown: We offer the letter and the attached call report.

The Clerk: Received and marked Plaintiff's Exhibit No. 15, produced by the defendant Nuodex.

(Questions by Mr. Brown)

Q. Now after you were promoted and Mr. Dwyer took over your job as regional sales manager, he continued to operate the same way that you did and jumped right on to New Hampshire accounts and wrote them in the same manner you did, that is so, isn't it?

A. He wrote them in the same manner I did, yes, sir.

Q. And sent in technical information as you did and sent in samples and that type of thing, the same fashion that you had previously operated?

A. Just as an appendage to our representative sales efforts, yes, sir.

Q. As an appendage, you say?

A. Or reinforcement, I should say.

Q. You and Litter Company were working hand in glove, so to speak, to get the maximum sales the territory would produce for you?

A. We would make available to them anything we could to help them achieve sales results.

Q. Who is Mr. Hickey on the distribution list, or Mrs.?

A. Miss Hickey, or Mrs. Maloney, head of our order department.

Q. Of Nuodex?

A. Of Nuodex, yes, sir.

Mr. Brown: I propose to mark that.

(Document handed to Mr. Sulloway by Mr. Brown.)

Mr. Sulloway: The whole thing?

Mr. Brown: Yes.

We offer a letter dated September 17 to Mr. Davis at the Nashua Corporation from Frank X. Dwyer, regional sales manager, to which are attached a sample order invoice and a salesman's report. There is no objection.

The Clerk: Received and marked Plaintiff's Exhibit No.

16, produced by the defendant.

(Questions by Mr. Brown)

Q. Now, Mr. Houston, when I was inquiring of you earlier today, you indicated to me, did you not, that you were not involved in the Great Falls Bleachery problem that Mr. Galbraith came up on?

A. I believe I did. I don't know whether I said indirectly or not, but I believe I said that.

Q. Apparently over the noon recess your memory has been refreshed?

A. No, sir; I think the facts are the same.

Q. Do you think you were or weren't?

A. I think you can have knowledge of something without being involved in it. I had knowledge, as whatever my title was at the time, of what was going on.

Q. Actually, that was a problem that was handled in the main by Mr. Cookingham, who is here, and Mr. Galbraith, who is not here, is that right?

A. Yes, and either Mr. Dwyer or Mr. Brumberger in our home office in New York, although I had knowledge of it without being involved directly.

Q. Actually, you were involved to a minor extent, according to the file, and I would like you to just look over an inter-office, or inter-company, correspondence under date of 8-29-51, which is contained in Plaintiff's Exhibit No. 5, and let me ask you whether that longhand note on the bottom of that memorandum is your own note, Mr. Houston, replying to an inquiry of Mr. Cookingham?

A. It is my writing.

Q. So that to the extent shown by that response, at least, you were in on that problem personally?

A. Well, I was in on this problem, no question about it.

Q. Well, would you satisfy yourself as to whether or not that is the Great Falls Bleachery problem on which Mr. Galbraith and Mr. Cookingham and Mr. Brumberger and whomever else you mentioned were engaged?

(Witness looking through papers.)

I think, Mr. Houston, there are two matters in that file.

A. I am trying to be certain they are related.

Q. I think you will find American Twine is not related to the Great Falls Bleachery problem, and the papers have been segregated in that fashion.

A. Well, I believe that my note was on a memo dated August 28, 1951. I think Mr. Galbraith's call was somewhat after that. In other words, I am not convinced the two are related.

Q. In that memorandum to which I directed your attention, Mr. Cookingham suggests that perhaps it would be of value for you to get a Mr. Milton Goll working on this problem. Now who is he?

A. Milton Goll is the former chief of our micro-biological lab.

Q. Is he the fellow that had anything to do with the development of Super-Adit?

A. He would have tested whatever compounds he might have developed, and in that sense he might have assisted. He might have assisted in the application development, but not actually in the product or chemical development.

Q. But in any event the suggestion is made to have Mr. Goll get in touch with the fellow up at Great Falls, and you are requested to send up to Mr. Hainsworth at Great Falls some information that isn't actually related to sales efforts at all, is it?

A. Well, this memo of 1951 simply states: any information you can possibly give us that might be of value, subject company would be appreciated. Perhaps it would be well for Milton Goll to call Mr. M. T. Hainsworth, Superintendent of above plant if you feel this would be more satisfactory.

Apparently, I scribbled a little note on the bottom and sent it back to them.

Q. They also asked additional information?

A. "Please send to attention of Mr. M. T. Hainsworth copy of abstracts of certain Government specifications for textiles and textile products requiring fungicides."

Q. What was your response as you wrote it on the original of

that memo and sent it back to Mr. Cookingham?

A. I said, "Howard, it would be possible to get waivers on this or Nuodex 100, but only after much difficulty, and then only with nonrepellent form of Jan-D 504. If water repellency is needed, then additional waivers are required.

"Milt feels we are well off to steer clear of this one. Bill."

Q. Now what you are talking about there is that there is a joint Army-Navy defense specification, and it is suggested that perhaps you can work out a manner to get waivers on the specifications to permit the introduction of a Nuodex product at this particular plant for the process that they are having difficulty with, right?

A. Yes, sir.

Q. And your note indicates that you did take it up with Milton Goll so far as that aspect of the problem is concerned, and he thought it best to stay away from it?

A. That's right.

Q. So that your own memorandum indicates that you were active at that point, at least to the extent of checking out with your lab, and also apparently considering whether you could do something about getting a waiver on a Government contract for this account?

A. No, that wouldn't be accurate. This is nothing more than technical service, and in 1951 I was original representative, and I was trying to get the Government to waive on certain requirements. I am not really up to date on it specifically, and upon consultation with our lab it looked like not a good idea in 1951.

Q. What I am trying to get at, that is the type of service that your organization was ready to perform when it made economic sense to go ahead with it, right?

A. Not to the point of interceding to get waivers. I don't want to give you a misapprehension here. This is the type of technical service we offer, but waivers must usually be obtained by the man who is building on or holding Government contracts.

Q. What they are talking about there is substituting a Nuodex repellent product for something that is specified in Government specifications, aren't they?

A. Yes, that's right.

Q. That is something that would require your technical people to back up the contractor if they are going to be able to get away with it, right?

A. No, not necessarily. It would require us to advise the customer whether he was on the right track, whether we thought he could accomplish this.

Q. Certainly you wouldn't want to be in a position of having waivers asked for to substitute your product unless it was a situation in which your products would work satisfactorily to accomplish what the Government wanted in the contract?

A. To the best of our knowledge, that is right.

Q. But those are two of the phases of that problem that received your personal attention at the time?

A. But this, of course doesn't relate to the other thing that we were talking about earlier, I guess, does it?

Q. Are you satisfied that is the extent of your own participation in whatever problem that was from the file?

A. On that problem, yes, sir.

Q. You were in to that extent at Great Falls?

A. Yes, sir.

Q. Actually, Mr. Houston, isn't it fair to say the way that your sales organization is set up, you do not differentiate between Nuodex sales people and your selling agent's people with respect to individual problems; you take the best man that is available, or best men that are available, from both forces and go after the problems for the purpose of solving them?

A. That wouldn't be accurate, sir, honestly.

Q. You are all chemical people so far as capability, is that right?

A. By formal training or otherwise we are, yes, sir.

Q. And —

A. We at Nuodex are.

Q. And as between Litter and Nuodex, you write back and forth on a special form that you call intercompany memo?

randa, right?

A. Yes, sir.

Q. You address the head of the Boston operation for Litter as Howard?

A. Yes.

Q. And sign your correspondence back and forth as Bill?

A. Yes, sir.

Q. And he corresponds likewise with you, he addresses you

A. That is exceptional, but in that instance I did.

Q. You mean you weren't always on those good terms?

A. We weren't always in such a rush which we were scribbling notes on the bottom of memos. More often we formalized the information.

Q. And, actually, your people, within the availability of personnel, were as ready to go on to these accounts as Mr. Cookingham's smaller staff, isn't that so?

A. Yes, but I should always emphasize in the context of reinforcing this manufacturer's representative's sales effort. That is what we are there for.

Q. Well, now—

Mr. Sulloway: Let him finish.

The Witness: That is what I am there for, and what what our regional managers and representatives and technical service people are all there for.

(Questions by Mr. Brown)

Q. It is a joint effort to get the maximum response for the sales dollars?

A. It is an effort which occasionally becomes joint.

Q. When it is necessary for it to become joint, it does become joint?

A. Certainly, in context of good-business.

Q. And, actually, what you folks attempted to do, and are still attempting to do, is have your products received as widely as the market will take it through reasonable efforts from the selling department, isn't that so?

A. Yes, sir.

Q. That is what they are paid for?

A. You bet.

Recross Examination

(Questions by Mr. Sanders:)

XQ. Mr. Houston, I show you another advertisement of Super-Adit. In what magazine was that run?

A. This advertisement appears in the March issues of Paint and Varnish Production and Official Digest, in the March 7th, 14th and 28th issues of American Paint Journal, in the March 10th issue of Paint, Oil and Chemical Review, in the April issues of Western Paint Review and Paint Industry.

Mr. Salloway: Don't you want to ask him - I didn't present it except as the other one, as to whether it was the kind of ad that was used earlier. It is obviously dated in 1955, after this action was started, and I assumed that he would ask the witness the same question.

Mr. Sanders: Okay, yes, all right.

(Questions by Mr. Sanders:)

XQ. And aside from the statement of subsidiary relationship, is this ad also more or less typical of the Super-Adit ads that have been run in the nationally distributed magazines from 1950 to date?

A. Well, this can be called typical, and the other might not be. This is typical of what most of our advertising on the product has been like.

XQ. What leads you to say that; what is the distinction between this and the other?

A. One thing, there is no reference in big print "Two to one its mildew." They are talking here of use, oil and alkyds, all aqueous systems. We are talking, we believe, through this media to technical people who are formulating paints. Thus our story, we believe, is aimed at them. That is why I spoke as I did before.

Mr. Salloway: And it may be understood that the reference to the subsidiary of Heyden Company the same rul-

ing is made in regard to that as with the previous exhibit.

The Court: Yes.

The Clerk: Received and marked Defendant King's Exhibit BB, produced by Nuodex.

* * * * * *

Mr. Brown: Mr. Clark, please.

Walter M. Clark called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

(Questions by Mr. Brown):

Q. Would you state your full name for the record?

A. Walter M. Clark.

* * * * * *

Q. What is your position with the company, now sir?

A. Manager paint industry sales.

* * * * * *

Q. You are concerned with sales all over the United States?

A. Yes.

Q. Rather than being confined to any region?

A. That's right.

Q. And on all products that are within the particular part of the business that you are handling?

A. Yes.

* * * * * *

Q. What is the Doggett and Pfeil Laboratories? Would you tell the stenographer how you spell that name?

A. Doggett and Pfeil Laboratories.

Q. What is that organization?

A. What is the organization itself?

Q. Yes, sir?

A. It is an organization selling it manufactures some fungicides, buys some packets, puts it in smaller packages, puts them in packages, and markets them under that name, Doggett and Pfeil Laboratories; in some products. Others, they buy and sell.

Q. To what extent, if at all, is there any ownership co-mingling between Nuodex or any of Nuodex's subsidiaries and Dog

gett and Pfeil Laboratories?

A. None at all. None whatsoever.

Q. You know that of your own knowledge?

A. Yes, from officers of Doggett and Pfeil and Nuodex Products Company.

Q. And how large an organization does Doggett and Pfeil have?

A. I don't know as to their exact size. They are a small organization, probably. Well, I don't know.

Q. Do they have more than ten employees?

A. They have about five or six in their office. And I haven't been through their plant in detail. They probably have twenty employees, probably.

Q. Actually, they are a custom bottler of fungicides, aren't they?

A. No.

Q. Well, they have since the end of May, 1954, for some period of time bottled and packaged Super-Adit under the name of Nuodex Products Company for distribution; that is so, isn't it?

A. That is so.

Q. And you are familiar with how that came about?

A. Yes.

Q. And is that still continuing?

A. Yes.

* * * * * *

Q. Do you recognize, Mr. Clark, that this copy of a letter to Doggett and Pfeil under date of February 15 consisting of seven pages over your name was a letter that you did send? (Letter handed to the witness by Mr. Brown.)

A. Yes.

Q. And that letter refers to a previous letter of April 14, which outlined an arrangement by which Doggett and Pfeil would package and distribute this Super-Adit product, isn't that correct?

A. Yes.

Q. And do you recognize that this second letter of two pages is your April 14 letter?

A. Yes, that's right.
Q. Who is Mr. Cornelius Zabriskie?
A. Nuodex counsel.
Q. Nuodex counsel, is that right?
A. That's right.
Q. And he is in New York City?
A. Yes, that's right.
Q. And you had correspondence from yourself to him with respect to this deal and with respect to how the package should be labeled and marked?
A. Correct.
Q. You say the problem was merely a registration problem?
A. No, this next letter—

Mr. Sulloway: Keep your voice up, so the stenographer and everybody can hear.

(Questions by Mr. Brown)

Q. There is another letter you apparently wrote to Mr. Zabriskie about another problem; what was that?
A. This letter here?
Q. Yes, sir?
A. That is a copy of his letter to me advising me about this state and registration.
Q. And he said that registration would be required if this thing were going into retail channels?
A. Yes. It is also industrial channels, too. It varies with the states.
Q. And he also brought up the matter of whether you would have to have Federal registration either of trademark or of the product?
A. That was already trademarked.
Q. It was already trademarked?
A. Yes.
Q. Now in his letter, he outlines a group of states where one registration covers everything?
A. Both industrial and at retail.
Q. And then in another section he sets out another group of states, does he?

A. The next one covers retail-industrial but charges for both. This first one is made in one charge.

Q. Now in connection with this setting up this Doggett and Pfeil proposition, you went into all these matters and considered them as Mr. Zabriskie outlined them to you to decide whether you or Doggett and Pfeil was going to pick up the problem of registration labeling, that is so?

A. I imagine it was discussed, yes.

Q. And it was all ironed out, actually, before the deal went through, right?

A. Yes.

Q. And amongst the things that you considered was Mr. Zabriskie's reporting state No. 20 to you, of course?

A. Yes.

Q. And what was state No. 20 on his listing?

A. State No. 20, that is New Hampshire.

Q. That is New Hampshire?

A. Yes.

Q. And he indicated that a registration in New Hampshire should be considered?

A. It would be necessary in both industrial and at retail.

Q. All right. Then you got another letter from him in which he reports to you as to the status of your registrations on Super-Adit in certain states?

A. That's right.

Q. And there is further correspondence to his office on June 14, 1954, from a Marion Kulynych?

A. That's right.

Q. And who was she at that time?

A. She was secretary to Mr. Don Roon.

Q. Donald Roon was the vice-president of Nuodex?

A. Right.

Q. At that point she is stating in her letter, is she not, that there are some new registrations that your company would like Mr. Zabriskie's office to process, isn't that what she says here? Here are some new registrations which we would like to have you process?

A. Yes.
Q. And what is the one at the bottom of the page?
A. New Hampshire: Nuodex 84.
Q. So you were considering registering Nuodex 84 at that point?
A. At that point I wasn't interested in Nuodex 84, and the answer is I don't know.
Q. Apparently, Mr. Roon's office was?
A. Yes.
Q. They knew they were doing business in New Hampshire with 84 and it ought to be registered up here, isn't that fair?
Mr. Sulloway: You have reference to registration with the Agriculture Department, not registering as doing business with the Secretary of State. Make that clear. This is under poison regulations.
(Questions by Mr. Brown)
Q. Do you know, actually, what your counsel is stating down there at his table, whether that is the fact? What kind of registration are we talking about here, can you tell? She is replying to a letter.
A. It is with the Agriculture, fungicide act.
Q. Which fungicide act, the Federal act or State act?
A. It is governed both there. Not in this one. This is the states she is talking about.

* * * * * *

Q. Was Super-Adit registered for sale in New Hampshire?
A. Registered with the fungicide act.
Q. With the Commissioner of Agriculture here in the State of New Hampshire?
A. Yes.

* * * * * *

Q. Mr Clark, after this Doggett and Pfeil deal was set up, it is a fact, is it not, sir, that in all states where it was permitted to do so, Nuodex permitted Doggett and Pfeil to merchandise Super-Adit in the name of Nuodex Products?
A. Did we permit Doggett and Pfeil to buy our fungicide and sell it as any other product as the sales representative?
Q. That was the situation?

A. It is.

Q. It is now?

The Court: Well, the question is: And was it?

The Witness: Prior to this, it was done the same identical way through the paint manufacturer.

(Questions by Mr. Brown)

Q. Do you recall whether or not there were two situations, one where Doggett and Pfeil was to put labels on indicating that it was Doggett and Pfeil doing the business, and one in which Doggett and Pfeil was permitted to machandise entirely in the name of Nuodex?

A. By our counsel, it was decided that it should be labeled as this bottle. As this bottle. Those are old stocks that were manufactured through paint manufacturers.

Q. May I see the bottle which you have picked out of your pocket?

A. Yes.

(Bottle handed to Mr. Brown by the witness.)

Q. You have picked one out which has on the front of the label on the bottle a marking: Marketed in bottles exclusively by Doggett and Pfeil Laboratories, Springfield, New Jersey?

A. Yes, that's right.

Q. If I open this one up in my hand here, which you can purchase here in New Hampshire, will I find that on the label of one that is in New Hampshire?

A. It is owing to when the date is that you are speaking of, because this has been marketed entirely by Doggett and Pfeil more recently, and since those that are in stock were branded by the Nuodex Products Company.

Q. Go ahead, sir.

A. That is it.

Q. Well, on your theory, if I can go out today in the city of Concord and buy that one labeled in that fashion, how do you explain that situation?

A. This label was printed prior to our arrangements with the Doggett and Pfeil Laboratories to be our exclusive marketing sales representatives.

Q You don't recall?

A You better look out for this. This cork is broken.

Q The top of it is broken, but that isn't a defect in your product?

A No.

Q That is the packaging?

A But I wouldn't monkey with this right now.

Q That is poison, is it?

A Yes, it is toxic.

Q It is dangerous stuff, right?

A In its pure state.

Q By the way, who determined in connection with Super-Vitt whether the product need be labeled under the Federal Fungicide Act; did Nuodex or did Doggett and Pfeil?

A Nuodex has always kept registration with the Federal Government in all of their products.

Q And?

A So it must have been through our counsel.

Q Through your counsel. And who advises your accounts, Nuodex's accounts, with respect to labeling paint products into which this product has been introduced?

A Will you repeat that question?

(The last question was read by the reporter.)

That is out of my jurisdiction.

Q Well, let me ask you, sir, whether this reproduction of a two-page document is a reproduction of something put out by Nuodex Products?

(Document handed to the witness by Mr. Brown.)

A Yes.

Q And what is the document that I handed you, what is it a copy of?

A Service data sheets.

Q Where does it come from?

A The Agriculture Department, Division of United States Department of Agriculture in Washington.

Q That is referring to something from the United States Department of Agriculture, isn't it. But who put it out?

A. Nuodex.

Q. Nuodex put it out. And to whom did Nuodex put it out?

A. To the paint manufacturers.

Q. Advising the paint manufacturers whether or not it was necessary to label the paint which had this poisonous material put into it, right?

A. When it is treated for mildew resistance?

Q. Yes, that is what I mean, sir. Those were instructions put out by Nuodex to the paint people such as King Company, right?

A. Yes, that's right.

Q. And that advice was that if the claims were restricted on the label, it was unnecessary to register the paint as being a fungicide, is that right?

A. That is according to the Agriculture Department.

* * * * * *

Mr. Sulloway: I have no objection to this being offered.

(Bottle handed to Mr. Brown by Mr. Sulloway.)

The way the product is marketed today by Doggett and Pfeil.

Mr. Brown: Very well. We would like to offer it on that basis, Your Honor.

The Court: All right.

The Clerk: Received and marked Plaintiff's Exhibit No. 17.

* * * * * *

Q. This page out of your reference manual was actually sent out to the trade announcing the change in your method of distributing this pre-packaged item, is that right?

A. That page there was sent to the Nuodex sales representatives and to the Nuodex men.

Q. And they were instructed on that document generally to send orders or inquiries concerning this particular product direct through to Doggett and Pfeil.

A. That's right.

Q. Now in 1953, Mr. Clark, do you recall that there was a bottling problem in connection with King Company, who had

a custom bottling account on which you did some work for another concern?

A. It's very hazy, but I do recall talking with the King Company, who was buying our product and bottling it for another company.

Q. Wilbur and Williams' label?

A. Yes, under their own label.

Q. Under Wilbur and Williams' label?

A. It wasn't our label, anyway.

Q. It wasn't your label?

A. That's right.

Q. And in 1953 you fellows came up and made an effort to get Super-Adit into those bottles?

A. No, I wouldn't say an effort.

* * * * * *

Q. You were in on those negotiations at that time with the King Company and their account?

A. Yes.

Mr. Sulloway: Now one moment. I raise the question of the materiality of transactions in Massachusetts with a paint manufacturer that is buying this in bulk or distributing in bottles.

The Court: All he is asking is, were you in on it? Were you aware of the controversy or whatever took place?

Mr. Sulloway: All right, I have no objection to his answering that yes or no.

The Witness: Yes.

(Questions by Mr. Brown)

Q. Did you personally, Mr. Clark, at the time know whether or not Wilbur and Williams' distribution extended into New Hampshire?

A. No, I did not know.

Q. You did not know?

A. No.

Q. You did know you previously said that they had been using a product of yours under their own label?

A. Yes.

Q. And am I correct that the purpose of your visit at that time was to see whether they would take Super-Adit in replacement of Adit for that purpose?

A. No, that wasn't the purpose at all.

Q. What was the purpose?

A. The purpose was to discuss the treating of house paints. And during that visit there seemed to be some trouble or dissatisfaction about the bottling, and I simply said if, as a service to you, the paint manufacturer, if it will help you any, we have this other means of selling this same product if you want to sell it under Super-Adit bottle.

Q. By selling the pre-packaged item?

A. Yes. But they would be the ones to sell it, of course.

Q. And beyond that, the substance of what you just told us, you were not involved in that particular situation personally?

A. Yes, I was.

Q. I say beyond?

A. Oh, beyond, no.

Q. By the way, one of the aspects of the Doggett and Pfeil transactions which we haven't mentioned was that the name Super-Adit remain the name of your company, and Doggett and Pfeil agreed not to use it on anything except your product, is that right?

A. Yes, just to insure the product.

Q. And, actually, you supplied the Super-Adit to Doggett and Pfeil?

A. They merely bottled it in four hundred pound drums.

Q. They are not supposed to adulterate it or dilute it or anything like that?

A. No

Q. Do you still control the pricing on it?

A. No. You mean the prices that Doggett and Pfeil sell?

Q. Yes?

A. No. In fact, they have changed.

* * * * * *

Q. Mr. Clark, I show you a brochure. I would like to ask you.

is that a brochure put out by Nuodex?

(Brochure handed to the witness by Mr. Brown.)

A. It is.

Q. And what product is it produced to explain?

A. Paint fungicide Super-Adit.

Q. And about when did you come out with that?

A. 1952.

* * * * * *

Q. So where there is talk about technical data coming along with the samples, this in whole or in part is what would ordinarily be submitted?

A. Correct.

Mr. Brown: We would like to offer it.

Mr. Sulloway: Yes, all right.

The Clerk: Received and marked Plaintiff's Exhibit No. 21

(Questions by Mr. Brown)

Q. Mr. Clark, yesterday afternoon we covered the situation that you produced Super-Adit about when?

A. 1952.

Q. And prior to that time, you had a similar product to do the same type of job?

A. Yes.

Q. And what did you call that?

A. Adit.

Q. And the two items, Adit and Super-Adit, were merchandised amongst other methods of merchandising in these little pre packaged containers which are at first glance identical except one is Adit and one is Super-Adit?

A. Correct.

Q. You also merchandised it in bulk to paint people and industrial accounts?

A. To paint manufacturers.

Q. To paint manufacturers. Now let me ask you this, sir: about when did you start merchandising Adit?

A. 1950.

Q. From 1950 on, in the development of Adit and Super-Adit, did Nuodex do any business at all directly into the State of

New Hampshire selling either one of those products?

A. If any of those products were sold in New Hampshire, it was sold through our sales representatives.

Q. And who would those people be?

A. D. H. Litter.

Q. And after this Doggett and Pfeil situation arose

A. I should correct that.

Q. I say, until Doggett and Pfeil, it would have been through Litter, you say?

A. Through Litter, or a paint manufacturer such as Sears Roebuck shipping into here.

Mr. Sanders: What is the tail end of that?

(The last answer was read by the reporter.)

(Questions by Mr. Brown)

Q. Before the Doggett and Pfeil development arose, you actually had Sears Roebuck as an account that you were supplying directly to?

A. Yes.

Q. And you understood and realized that they were further distributing in their own business?

A. Yes.

Q. And of course you knew Sears Roebuck had stores up here in New Hampshire?

A. Not to my knowledge.

Q. Aside from your representative Litter and Doggett and Pfeil, after they came into the picture, and Sears Roebuck and these other large accounts that you had before Doggett and Pfeil, did Nuodex sell any Adit or Super-Adit directly into the State of New Hampshire?

A. No, not to my knowledge.

Q. Well, would you be in a position to know, sir?

A. No, I don't think I would.

Q. Who in your organization would be in a position to know?

A. The sales manager, I suppose.

Mr. Sanders: Who?

The Witness: The sales manager.

(Questions by Mr. Brown)

Q. Mr. Houston?

A. Yes.

Q. By the way, Mr. Clark, back in 1953 and 1954, Mr. O'Neil who is your present vice-president in charge of sales and marketing, was also working for the company?

A. No.

Q. He was not?

A. No. Mr. O'Neil has only been with us since last December, I believe.

Q. Well, how many Mr. O'Neils do you have in your sales operation?

A. One.

Q. He is the only one?

A. Yes.

Q. And he was not active with the company back at the time of the Doggett and Pfeil setup?

A. No.

Q. Have all of the invoices covering business that Nuodex has done in New Hampshire from 1950 until the date of 1955 when the records were stopped, have all of the invoices of Nuodex to accounts in New Hampshire been produced here?

A. That was not my responsibility. I do not know. But I think Mr. Reiter would be in a position to know.

Q. You personally do not know of any business direct into the State of New Hampshire on these retail packages?

A. Correct.

Q. And what is your explanation of the situation, again, where we can buy Adit or Super-Adit in a small retail store such as Dover Paint and Varnish?

A. The only explanation I know would be that it is old stock sold in this area by some other paint manufacturer. We have not made Super-Adit at all—I mean Adit— since 1952.

Q. You have, of course, sent in orders of Super-Adit and samples of Super-Adit into New Hampshire on these accounts, the invoices of which have been produced here?

Mr. Sulloway: Well, I guess he doesn't know that. It would be the salesman, wouldn't it, Mr. Johnson? The

records have been read here. If he knows anything about it, I am willing to have him answer.

Mr. Brown: Read the question.

(The last question was read by the reporter.)

The Witness: Only from the information I have heard in court.

(Questions by Mr. Brown)

Q. Those are sample distributions or sales which are charged through Litter; that is, that you would consider were part of the Litter activities?

A. I would think so, yes.

Q. Now I would like to specifically ask that all of the other invoices from Nuodex to New Hampshire accounts from 1950 to the date in May of 1955 covered by the other exhibits, that all the rest of the invoices be produced at the present time.

Mr. Sulloway: We have produced all the invoices which we are aware of. The company representatives searched for all the invoices, and we believe they are all there relating to sales in New Hampshire which were handled as shown by the invoices.

Mr. Brown: I am not asking for merely the Litter business. I am asking for Nuodex business direct with which Litter was not credited.

Mr. Sulloway: There are no such invoices, and other officers of the company will be on the stand. You can ask Mr. Houston. There were no direct sales from New Hampshire.

(Questions by Mr. Brown)

Q. Mr. Clark, what is that paper I hand you; is that an original invoice?

(Invoice handed to the witness by Mr. Brown.)

A. It looks so.

Q. An invoice from whom?

A. Dover Distributing Company.

Q. To Dover Distributing Company?

A. Yes.

Q. From whom?

A. Nuodex Company.
Q. On what date?
A. February 28, 1951.
Q. Covering what?
A. Six 5-ounce bottles of Adit.
Q. Who are the sales people who are indicated on it for distribution?
A. W. J. Houston; Sales; Clark.
Q. Anything about Litter?
A. No.
Q. What does that indicate to you, sir?
A. Indicates an error.
Q. It indicates a direct sale by Nuodex to an account that nobody has mentioned from Nuodex, right?
A. Correct.

Mr. Brown: We offer the invoice, Your Honor.

(Invoice handed to Mr. Sulloway by Mr. Brown.)

(Invoice handed to Mr. Sanders by Mr. Brown.)

The Clerk: Received and marked Plaintiff's Exhibit No. 22.

(Invoice handed to the Court by Mr. Brown.)

(Questions by Mr. Brown)

Q. Mr. Clark, where in the filing of accounts on that type of thing in your company would other invoices to distributors at the retail level ordinarily be filed, do you know?
A. There is no such file, as far as I know. We have no
Mr. Sulloway: We have what?
The Witness: We have no file for any customers for the retail level, because we do not sell at the retail level.

(Questions by Mr. Brown)

Q. Do you know whether Dover Distributing is a retail level?
A. If it is, it is strictly an error, because we have no system for that, to my knowledge.
Q. What about other retail installations here in New Hampshire? You still say you don't sell those at all through Nuodex direct?

A. No. As the policy goes, it goes straight through the paint manufacturers' sales representatives such as D. H. Litter.

Q. Did you bring with you the records indicating the amount of business that you have done with Doggett and Pfeil since the February 15, 1954, arrangement with them?

A. No.

* * * * * *

Q. Let me ask you this, Mr. Clark: you supply all of the Super-Adit in bulk that Doggett and Pfeil buys?

A. Yes.

Q. And they bottle and merchandise it on a twenty per cent deduction from your price; that is the arrangement?

A. I wouldn't be sure about the twenty per cent, but it is a reselling discount.

Q. It is a cutdown from your listed price that you use?

A. Correct.

Q. In 1955, this year, have you done any business with them; have you sold them any Super-Adit at all?

A. Yes, I suppose we have.

* * * * * *

Q. Does the file contain the 1955 business?

A. Well, if we have sold Doggett and Pfeil anything in 1955, Super-Adit, it is not in this folder.

Q. And from your own knowledge, have you sold them anything in 1955?

A. By strictly memory, I believe so, but I can't swear to it.

Q. It would be unusual if you hadn't wouldn't it?

A. Yes.

Q. Do you know generally how much business you do with them on an annual basis?

A. No.

Q. And do you get any reporting back from Doggett and Pfeil with respect to which of your accounts they are selling on this item?

A. No. We have no control over the sale of Doggett and Pfeil after we sell them the Super-Adit.

Q. That isn't what I asked you. Do you get any report back?

A. No.

Q. As to the accounts they are selling?

A. No.

Q. You did register Adit and Super-Adit in New Hampshire?

Mr. Sulloway: We have got a certificate here.

Mr. Brown: I am not interested in the certificate, Mr. Sulloway.

The Witness: So our records would indicate.

(Questions by Mr. Brown)

Q. And after registering it, you did sell both of those products into this state?

A. Through our sales representatives.

Q. And in at least one instance directly yourself?

A. So the invoice indicates.

Q. And you also sent in literature such as the brochure which we have introduced this morning?

A. From request.

Q. And you sent in free samples through your sales representatives and made some sales through them into New Hampshire?

A. As was discussed yesterday.

Q. And that product is actually a dangerous product in its concentrated form, is it not?

A. It must be registered.

Q. And you registered it because it was an item which, if it were going to be sold here, required registration?

A. Correct.

Q. And you don't register in places where you don't expect to sell, of course?

A. We register for that in all states simply because our customers such as Sears are apt to sell in any state, and we want to protect our customers.

Q. And your own sales organization covers all forty-eight states?

A. Sales representatives.

Q. Your own sales organization?

A. That could be answered by Mr. Houston.

Q. You don't —

A. Might be certain exceptions, I don't know about.

Q. Let's talk New Hampshire. Certainly New Hampshire is included?

A. Through D. H. Litter Company.

* * * * * *

Q. You know, Mr. Clark, New Hampshire is included in the regional area under the regional sales manager, who was Mr. Houston and then was Mr. Dwyer, you know that?

A. In a supervisory capacity.

Q. Within the scope of that job, he is responsible for New Hampshire, right?

A. In the scope of his job, that's right.

Q. In view of that wide coverage of your product, wide dispersion of it, of course Nuodex itself, as the manufacturer, covered the product with product liability insurance, did it not?

A. That could be answered by Mr. Reiter. I think so, but I am not sure.

Mr. Sulloway: I object to that as having no materiality on the question of jurisdiction, what insurance the home office covered.

Mr. Brown: On the contrary.

The Court: Well, go ahead, let's see what you have here.

Mr. Sulloway: May I have an exception?

The Court: Yes.

(Questions by Mr. Brown)

Q. Do you recall, Mr. Clark, that in your deal with Doggett and Pfeil, part of that deal is that your product insurance protects them in their distribution of your product, remember that?

A. Yes.

Mr. Sulloway: Subject to our exception.

(Questions by Mr. Brown)

Q. And that was part of that arrangement?

A. As is stated here, yes.

Q. And the reference that we were talking about is in your original letter to Doggett and Pfeil under date of February 15, 1954, which is a part of Plaintiff's Exhibit No. 9?

A. Yes.

Q. Now just one other thing, Mr. Clark. Can you help us at all on about how many paint manufacturers who distribute their paints on a national scale incorporate Super-Adit in one or more of their paint?

A. I could give no exact figure.

Q. About how many?

A. I would say some four hundred.

Q. About four hundred?

A. You are speaking now of putting or treating their paint with Super-Adit?

Q. Yes, About four hundred, more or less?

A. About four hundred.

Q. And do you know how many of those manufacturers distribute paint with Super-Adit incorporated in this state?

A. No, I have no way of knowing.

* * * * * *

Q. When one of these paint manufacturers adds Super-Adit to the paint, under the labeling policy which Nuodex suggests, would there be any indication on the label of the paint itself showing that that particular additive was in it?

A. No.

Mr. Brown: Thank you. No further questions.

Cross Examination

(Questions by Mr. Upton)

XQ. Mr. Clark, when did the Nuodex company first put out Adit or Super-Adit in one-ounce bottles for the retail trade?

A. I think it is in 1952.

XQ. 1952. And how was the retail trade reached; that is how was this product brought to the retail trade?

A. The product was brought to the retail trade by selling to our paint manufacturers, and they in turn selling their customers.

XQ. Well, what did you sell to the paint manufacturers?

A. We sold

Mr. Sulloway: Wait a minute. I guess he hasn't finished.

Mr. Upton: That is all right.

Mr. Sulloway: Go ahead.

The Witness: We sold the package as shown to the paint manufacturer.

(Questions by Mr. Upton)

XQ. Well, are you referring to packages here on the desk?

A. Yes.

XQ. And let me call your attention to one of them which is labeled Super-Adit. That contains a five-ounce bottle?

A. Yes.

XQ. And it labels, the package itself was put out by whom?

A. This was probably put out by the Nuodex Products Company, because the Doggett and Pfeil name is not on it.

Mr. Upton: May we have this marked for identification?

The Clerk: Received and marked Defendant King Exhibit CC.

Mr. Upton: Produced by the plaintiff.

XQ. So this five-ounce bottle of Super-Adit, Exhibit CC, was put on the market by the Nuodex Products Company?

Mr. Sulloway: Well, no. I don't understand he said so. He furnishes it to his selling concern like Sears Roebuck, or something like that.

(Questions by Mr. Upton)

XQ. Well, how is it put out?

A. This was sold to a paint manufacturer who in turn sold it to his customers, as far as our policy goes.

XQ. That would be the usual course?

A. That would be the usual course.

XQ. And you began to put out the one-ounce and five-ounce bottles for the retail trade in 1952, at that time using Adit?

A. No, in 1950 with Adit. And we changed to Super-Adit in 1952.

XQ. Then you have been putting out Adit and Super-Adit in

one-ounce and five-ounce bottles for the retail trade since 1950?

A. No. We put out one-ounce and five-ounce bottles of Adit sometime in 1952. Then we put out Super-Adit in bottles. In other words, we changed the product in 1952.

XQ. The plaintiff has here what appears to be a five-ounce bottle of Adit with a container. Was that put out by the Nuodex Company?

A. This was put out by Nuodex Company to the paint manufacturer.

Mr. Upton: We offer the bottle and container produced by the plaintiff.

The Clerk: Received and marked Defendant King's Exhibit DD.

(Questions by Mr. Upton)

XQ. This five-ounce bottle of Adit which has just been marked as Exhibit DD was presumably put out prior to 1953?

A. Not necessarily.

XQ. Well, I am referring to the bottle of Adit as distinguished from Super-Adit?

A. Oh, Adit. Yes.

XQ. And when would you say that was put out?

A. Sometime in 1950 to 1952 or such.

XQ. Here is a letter from a file, Plaintiff's Exhibit No. 19, apparently from you to Mr. Doggett under date of May 11, 1954.

(Letter handed to the witness by Mr. Upton.)

A. Yes.

XQ. There are several companies referred to in that letter. What is the nature of the business in which those companies were engaged?

A. Hann Paint Company, manufacturing paint; McDougall Butler Company; Lookout Supply Company, Fort Lauderdale, Florida, Armstrong Paint and Varnish Works, distributors; Bradley Paint Company, Connellsville, Pennsylvania. I am not acquainted with that. I couldn't say.

XQ. Well, you had at that time an order for Super-Adit in one-ounce and five-ounce bottles from these several companies?

A. This was during the time of the change from Nuodex Products with our stocks, and selling to the paint manufacturers or the legitimate distributors, too. By the time Doggett and Pfeil got under way with their labels and their products, these orders accumulated and they were sent to Doggett and Pfeil to be filled by Doggett and Pfeil Company.

* * * * * *

XQ. Will you please read so much of this letter which relates to these orders?

A. "You will also find attached papers relative to four orders which should be shipped as soon as possible.

"Hanna Paint Company, 95 W. Long St., Columbus, Ohio, Order No. 622. Please note since it was an emergency order we shipped the 72-1 oz. Super Ad-It bottles as we had those ready for shipment. The correspondence indicates that they are in a rush for the 5 oz. bottles.

"McDougall, Butler Company, 288-1oz. bottles, 144-5 oz. bottles.

"Lookout Supply Company. As requested by our customer, Mr. Sappington of the Armstrong Paint & Varnish Works, Chicago, 288-1 oz. bottles Super Ad-It and 36-5 oz. bottles Super Ad-It.

"Bradley Paint Company. Their order and my letter indicates that they are in a great rush for the 15 5 oz. bottles."

XQ. And then you were distributing Super-Adit in one-ounce and five-ounce bottles on what might be termed an extensive scale at the time Doggett and Pfeil became your bottling agents?

A. We were distributing as described before. We were selling them to the paint manufacturers through our sales representatives.

XQ. Well, now, what sales were you making to what might be called the retail trade?

A. None.

XQ. Well, you have referred to Sears Roebuck. They are retailers?

A. They are paint manufacturers having five plants.

XQ. But they were also selling your Super-Adit in one-ounce and five-ounce bottles?

A. As a paint manufacturer in their paint retail stores.

XQ. Now your attention is called to what appears to be a letter, or a copy of a letter, from you to Mr. Doggett under date of May 20, 1954, in which it is stated, "We have previously sent you special files for Sears-Roebuck, Devoe & Reynolds and Duponts." Were Devoe and Reynolds and Duponts among your customers for Super-Adit?

A. Yes.

XQ. And what is the nature of the business carried on by Devoe and Reynolds?

A. A. Paint manufacturing and the distributing of other paint materials through their distributors or other retail stores.

XQ. And they were purchasing the Super-Adit in one-ounce and five-ounce bottles for the retail trade?

A. Yes.

XQ. Now this letter also states that, "You will find enclosed two sets of invoices marked "A" and "B".

"A-One invoice of each of our paint manufacturing customers who have purchased bottles from us, regardless of amount or date."

You have no way of telling us at the time the names of those paint manufacturing companies covered by these invoices referred to in this letter?

A. No. It was a list of the paint manufacturers, just as in this same letter, I mean the previous letter, such as Sears, Devoe's. But in our agreement with Doggett and Pfeil, we told them that we would hand this business over to them as the sales representative.

XQ. Well, now, there is reference in this correspondence contained in Plaintiff's Exhibit No. 19 to a formal contract. No formal contract was ever executed?

A. No. It was thought not necessary from our counsel.

XQ. And Doggett and Pfeil, under the terms set forth in this correspondence, undertook to act as bottling agent for the Nuodex Company?

A. Correct.

XQ. And Nuodex undertook to register this product wherever Doggett and Pfeil might do business?

A. As we would for all sales representatives.

XQ. And your sales representatives were directed to turn over all orders for Super-Adit in one and five-ounce bottles to Doggett and Pfeil?

A. Yes, that is correct.

XQ. That was covered by this sheet which is here containing instructions to the sales representatives?

A. Correct.

XQ. Who fixed the price which these bottles should be sold, one and five-ounce bottles?

A. The customers.

XQ. Well, who fixed the price at which Doggett and Pfeil should sell?

A. Doggett and Pfeil. In fact, they have changed it.

XQ. That has been changed?

A. They changed it two or three months ago.

XQ. You mean Doggett and Pfeil have changed the price?

A. Yes.

XQ. There is provision here for a commission to Doggett and Pfeil on sales?

A. No.

XQ. How is that worked out?

A. There is no commission involved. We sell—the only profit that we make out of Doggett and Pfeil is the selling of them, of the four hundred pound drums.

XQ. Your attention is called to page four of a letter of February 15 from Nuodex Products Company to Doggett and

Pfeil, and particularly the paragraph entitled "Cost of Super-Adit to the Bottling Agent." Will you please read that?

(Letter handed to the witness by Mr. Upton.)

A. "The cost of Super Ad-It to the bottling agent, since it is to be packaged in bottles for resale purposes, will be 20% less than our regular mailing price. The Nuodex Co. will advise the agents three months in advance of any necessary change in this price structure."

XQ. Have the operations of the bottling agent been carried on under this stipulation contained in the letter; in other words, is that stipulation controling at the present time?

A. I think there has been some price adjustment since then but I wouldn't know the exact details.

XQ. Is there any correspondence?

A. It is approximately the same thing.

XQ. Approximately the same arrangement in regard to price?

A. Yes.

XQ. Now Nuodex determines the labels under which this product shall be sold in bottles?

A. We have the copyright.

XQ. You have determined the form?

A. It was the original form.

XQ. Which the bottling agent shall use?

A. As long as they sell Super-Adit in those bottles.

XQ. Your attention is now directed to what appears to be a copy of a letter from you to Doggett and Pfeil Company under date of April 30, 1954. Does that contain instructions as to the form which the label shall take on these one-ounce and five-ounce bottles?

(Letter handed to the witness by Mr. Upton.)

A. You want me to read it out loud?

XQ. You may read it and tell us; and answer my question, if you can. You may read it, as you prefer?

A. "You will find attached a 1 oz. and a 5 oz. label as previously sent to you. From our visits with Mr. Zabriskie there is a detail in our present labels which should be

corrected when printing your own. The following is a quotation from Mr. Zabriskie:

"It is noted that the labels which you sent me do not contain the notice of Federal trade-mark registration. This should be applied not only to your labels but Doggett & Pfeil should be informed that such notice should be applied to the label which they use. There are two forms of notice, but I suggest the R in a circle thus ® printed in the smaller type at the end of the words SUPER AD-IT.

"You will note the small R encircled in pencil which will correct this detail."

XQ So these labels were originally proposed by whom, what you had before you?

A By Nuodex. We were using these labels.

XQ And in conformity with the suggestion of your counsel notation was made to indicate registration?

A To protect our label.

XQ Yes. And who was engaged in printing labels at that time? I mean, who, as between Nuodex and Doggett and Pfeil? This was in 1954?

A Doggett and Pfeil now prints all their labels. I think the first, to get them started, we had the printer who was used to it do it.

XQ And do you also determine the form of the other package in which these bottles are sold?

A No. The label, or the name on the label itself is our own determination. They may even discontinue, which I think they have, packeting it in the box itself.

XQ Who was attending to the registration in the Super-Adit in the states where registration is necessary?

A The vice-president's office.

XQ And who would have charge, who would attend to the details?

A Miss Kulynych is the one that writes the letters.

XQ Now did you know whether Nuodex is registered here in New Hampshire for products other than Super-Adit and

Adit?

A. That doesn't come under my jurisdiction.

XQ. Well, what is Nuodex 84?

A. It is a fungicide.

XQ. Used for what?

A. I don't know. It is out of my line.

XQ. Well, what can you tell us about Nuodex 321 88?

A. That was the original product name prior to the trade name Adit.

XQ. Well, then, that is a designation for what was known as Adit?

A. At that time. It has been discontinued since.

XQ. And what is Nuodex Copper, eight per cent?

A. That is a copper preservative.

XQ. Used for what?

A. Preservative for wood and other things out of my category.

XQ. How are those products distributed other than Adit or Super-Adit?

A. Through our sales representatives.

XQ. That is, all your products are distributed through your sales representative in this territory?

A. To my knowledge, yes.

XQ. Do you know whether Nuodex Copper eight per cent has been registered in New Hampshire?

Mr. Sulloway: We admit it. We have the list here. You can take it if you want it.

Mr. Upton: No doubt it has been registered. I wanted to find out to whom it was sold.

(Questions by Mr. Upton)

XQ. Do you know to whom this product has been sold?

A. No, I wouldn't know.

Mr. Upton: That is all.

(Questions by Mr. Sulloway)

XQ. Mr. Clark, if I understand you, since this arrangement with Doggett and Pfeil along in the spring of 1954, your

sales of Super-Adit in bottles with a label such as has been described, is wholly through Doggett and Pfeil, is that right?

A. That is correct.

XQ. Are they your distributors for the purpose of selling wherever they can, to whomever they want around the country?

A. They are.

XQ. Now do you, or did you, and do you still, sell in bulk, Super-Adit?

A. Yes.

XQ. To whom?

A. Paint manufacturers.

XQ. To paint manufacturers. Now do you know whether any of those paint manufacturers do put it in bottles with something else, or alone, and sell it?

A. Primarily, the great volume of business is in the bulk, to treat paints against mildew. However, there may be, and it is their business if they want to put the product in bottles, register it themselves, and sell it.

XQ. In other words, you have had since May, April or May of 1954 these sales in bulk, and then bottled by the Doggett and Pfeil Company as you have described, and also sales in bulk in the regular course to any paint manufacturer to use?

A. That is correct.

XQ. As they see fit. Now before that time, as I understand it, you first made a package here which contained a compound Adit, is that right?

A. That is correct.

XQ. And, as you have described, that was sold to paint manufacturers or distributors wherever your sales distributors got customers, is that right?

A. That is correct.

XQ. And after Adit was changed to Super-Adit, and that is before you made your arrangement with Doggett and Pfeil, was Super-Adit sold in the same way to paint man-

ufacturers in this sort of a package as I show you as Adit was?

A. That is correct.

XQ. And at no time since you have made your arrangement with Doggett and Pfeil has there been sales in the kind of package shown by these exhibits here of Adit and Super Adit, is that right?

A. That is correct.

XQ. And so far as any sales by D. H. Litter and Company to New Hampshire, to your customers in New Hampshire, there was never any sales in bottles to those part customers in New Hampshire who were served by D. H. Litter?

A. Not to my knowledge.

* * * * * *

XQ. Mr. Clark, in regard to the Doggett and Pfeil Company, you state that you sell them in bulk, the quantity that they buy?

A. That is correct.

XQ. And do they pay for it?

A. Yes.

XQ. And the price that they charge in bottles is fixed by them?

A. That is correct.

XQ. And it can be changed?

A. Yes.

XQ. And so is there any commission basis about it at all in connection with it?

A. No, no commission.

XQ. A straight case of sale of Super-Adit in bulk to Doggett and Pfeil?

A. Yes.

XQ. Is that right?

A. Yes, that's right.

XQ. Which they receive and pay for?

A. Yes.

XQ. And that is irrespective of the amount they sell?

A. Yes.

XQ. And this Doggett and Pfeil Company is where?
A. Springfield, New Jersey.
XQ. And where is the Super-Adit in bulk shipped to?
A. Shipped from Elizabeth, New Jersey, to Springfield.
XQ. And after it is shipped to Springfield, New Jersey, do you have any control over it?
A. No.

* * * * * *

XQ. But, at the same time, when you are selling to Doggett and Pfeil in quantity for their distribution, are you selling to paint manufacturers in New England and elsewhere for distribution to their customers wherever they want to sell?
A. The bottles, you mean?
XQ. No, I say in bulk?
A. We still sell in bulk, we hope.
XQ. All your products?
A. Yes.

Mr. Sulloway: That is all.

Redirect Examination

(Questions by Mr. Brown)

Q. And amongst those paint manufacturers that you hope you are still selling in bulk to is Milford Paint down in Milford, Hampshire?
A. I am not acquainted with that.

Mr. Sulloway: What he hopes to sell I don't think is important.

Mr. Brown: You had him say he hoped to.

The Witness: If we sell to Milford Paint Company, if Milford Paint Company, if Milford was sold Super-Adit, it would be sold through D. H. Litter Company.

(Questions by Mr. Brown)

Q. Yes, Mr. Johnson, who already testified, was the fellow who would call and did call on them and try to sell them Super-Adit, right?
A. That is correct.

Q. Mr. Clark, this Copper 8 is a wood preservative?
A. Yes.
Q. Corpus Corporation is one of your accounts on it?
A. I wouldn't know.
Q. You know the Corpus Corporation?
A. I have heard of them, yes.
Q. You know they have a plant here in New Hampshire?
A. Yes.
Q. Why did you register that particular product in New Hampshire; was it because of the Corpus account?
A. I am not qualified to answer. That wood preservative comes under fungicide division.
Q. That wasn't part of the area you were charged with at that time?
A. No, not at that time.

* * * * * *

Recross Examination

(Questions by Mr. Upton)

XQ. Your attention was directed to the letter of May 20 from you to Mr. Doggett in which reference was made to invoices. I referred to the invoice under Class A, in the course of my cross examination. Now is there also a Class B, and if so, what is comprehended by that classification?
A. "One each of non paint manufacturing customers who we normally not sell but have sold at the request of their source of paint supply."
Such as if the Benjamin Moore Company requests us to sell their distributor in New Orleans, we, as a service to Benjamin Moore, would sell them. But it must, as a policy, should be, it must be through the request.
XQ. Well, this letter indicates that on May 20, 1954, you had both paint manufacturers and retailers among your customers?
A. No, there are no retailers in this list anywhere. The distributor. There is a great difference between distributor and retailer. A distributor buys in car lots and has salesmen to sell that product to retailers.

XQ. Are we to understand that Nuodex was selling in car load lots?

A. No.

XQ The Super-Adit in one and five-ounce bottles to non-paint manufacturing customers?

A. No. The Benjamin Moore distributors such as the Sanders Brothers in Richmond, Virginia, buy large quantities and run seventeen or eighteen salesmen over that area calling on retail dealers. And if Benjamin Moore wanted us to sell them to save them the trouble at their regular price to Benjamin Moore, without Benjamin Moore getting into it, we would do it as a service to Benjamin Moore. But only to distributor, not retailer dealer.

XQ. Then you were selling to distributors other than paint manufacturers?

A. At the request of the paint manufacturer, isolated cases.

XQ. Do you recall making sales to the Eastern States Farmers Exchange?

A. No, I know nothing about that.

XQ. You know nothing of them. But you have various non-paint manufacturers as customers as indicated here making distribution of Super-Adit in these small packages on a large scale, and have had for some years?

A. At the request of the paint manufacturer.

XQ. And there are no copies of these invoices in this file which is produced here for the trial?

A. No, I suppose not.

XQ. Is there any way that we could know who these non-paint manufacturer customers were?

A. If Doggett and Pfeil preserved them, I suppose it could be arranged.

XQ. And you don't know of any other source for this information?

A. No.

XQ. Well, your own files would give some information?

A. Our own files for that, we sent the invoices over because

we didn't want any more we were turning it over entirely to them.

Mr. Upton: That is all.

(The witness left the stand.)

Mr. Brown: Mr. Laramie.

George Laramie called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

(Questions by Mr. Brown)

* * * * * *

Q. What is your name, sir?

A. George Laramie.

Q. And what is your occupation, sir?

A. Control Supervisor, New Hampshire Department of Agriculture.

* * * * * *

Cross Examination

(Questions by Mr. Sanders)

XQ. Mr. Laramie, how long have you been employed by the State of New Hampshire at the Department of Agriculture?

A. Ten years.

XQ. Yes. And just generally, what are your duties, and what have been your duties since, say, 1950, in connection with the registration of so-called economic poisons?

A. I receive the registrations from the manufacturers, check the registration and labeling as per our economic poison law of 1949, and if they meet with our requirements of our law, we stamp the Commissioner of Agriculture' name Perley I. Fitts on each copy and send the duplicate copy to the manufacturer, which is a certificate of registration, after giving it a number, and file the original and the label in our files.

XQ. And are you now, and since 1950, have you been in general the supervising custodian of these records you have described?

A. I have.

XQ. Now in connection with the registration of so-called economic poisons, what sort of documents and accompanying materials customarily come in to you in connection with a given registration?

* * * * * *

The Witness: The registration application and the label completely filed according to the law.

(Questions by Mr. Sanders)

XQ. Now would you tell us to what extent your department preserves past applications for registration?

* * * * * *

The Witness: At the time the registrations are approved and given a number, my secretary fills in the information as pertaining to the name and address of the manufacturer, the name of the product and the date, and the number of each individual product, in addition to the amount of the check received. The check and the two three-by-five cards are presented to our accounting department. One is kept in their file. The check is deposited with the State Treasury. And the original three-by-five card is sent back to me. Those three-by-five cards are kept for seven years. And the registrations themselves are kept for two years. In other words, we have a 1955 and 1954 registration. And when 1956 comes in, we destroy the 1954 and keep 1955 and 1956.

(Questions by Mr. Sanders)

XQ. To what extent does the department endeavor to keep correspondence from a particular applicant?

Mr. Sulloway: We object to this as immaterial.

The Court: He may answer.

The Witness: The correspondence is separated from the old registration before it is —

Mr. Sulloway: Exception.

The Witness: —before it is destroyed, and the correspondence is kept year by year under separate folder by name of manufacturer.

(Questions by Mr. Sanders)

XQ. The correspondence is preserved?

A. Yes, sir.

XQ. Did I summons you to appear here this morning and to produce the complete files of your department with reference to all applications by Nuodex Products Co., Inc., for registration of any and all economic poisons which they were selling?

A. I have this summons here.

XQ. All right. And have you produced the file in question?

A. I have the file here, sir.

XQ. Yes. Now do you find that this concern has, since 1950, registered various products manufactured and sold?

A. Yes, sir.

XQ. What is the first registration you find pursuant to application filed by Nuodex Products Company?

A. Nuodex Copper, eight per cent.

XQ. And on what date did Nuodex apply for that registration?

A. January 12, 1950.

XQ. And in telling us this, to what record are you referring?

A. I am referring to the three-by-five historical cards and accounting cards that we have.

XQ. As I think you previously told us, the application, original application, in this connection pursuant to the policy of the department has been destroyed?

A. That is right, sir.

Mr. Sulloway: If you want to shorten this, we will admit we did register that, together with other products, if you want to shorten this up.

Mr. Sanders: We have more than that. We have correspondence coming in now.

Mr. Sulloway: Well, all right, if you want anything more than the registration, the fact they registered under the law. We would like an exception to the admission of anything else.

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(Questions by Mr. Sanders)

XQ. Now, Mr. Laramie, when did Nuodex Products Company next register any economic poisons?
A. On April 7, 1950, they registered Nuodex 321 SS.
XQ. And again you are referring to what in order to tell us this?
A. The three-by-five accounting cards.
XQ. By the way, are registrations annual?
A. Yes, sir.
XQ. Now when did Nuodex Products next register any material?
A. May 10, 1950. Adit.
XQ. When did Nuodex next register any economic poison?
A. August 21, 1950.
XQ. And what was registered then?
A. I am sorry on that one. To answer your question, the next one was on January 10, 1951, Nuodex 321 SS and Adit.
XQ. Were those two separate registrations?
A. No, sir, they came together.
XQ. And, incidentally, what is the filing fee in connection with each registration?
A. Ten dollars per brand up to one hundred dollars, and free after the one hundred dollars has been paid.
XQ. And has that been the situation since the enactment of the act in 1949?
A. Yes, sir.
XQ. What was the next registration by Nuodex?
A. March 1, 1951, Adit.
XQ. And the next registration?
A. February 4, 1952, three of them; Adit retail, Adit industrial, and Nuodex 84.
XQ. And so, accordingly, how much was owed or paid to the state in connection with those three registrations?
A. We received a thirty dollar check.
XQ. And the next registration?
A. August 21—I'm sorry. March 24, 1953, Nuodex.
XQ. Just a minute, Mr. Laramie. Do you have any registration as of 1-22-53?

A. 1/22-53, Super-Adit.

* * * * * *

XQ. In connection with the registration of January 22, 1953, by Nuodex of Super-Adit, do you find in your file any correspondence between the department and any representatives of Nuodex?

A. Yes, on December 30, 1952.

* * * * * *

XQ. And also a letter—and do you also find a letter of January 20, 1953, in connection with this registration?

A. Yes, sir.

XQ. And is there attached to one of these letters certain data and labeling; do you find attached to the letter of December 30, 1952, certain data or labeling?

* * * * * *

A. Yes, sir.

* * * * * *

XQ. Would you let me have the letter of December 30, 1952, with attached material?

(Letter handed to Mr. Sanders by the witness.)

Mr. Sanders: We offer the correspondence which has now been produced by the witness.

Mr. Sulloway: We object, Your Honor, as having no bearing on any issue in the case, it appearing that registrations were granted to various products in accordance with the law. I therefore object to putting in whatever it may be in the way of correspondence as having absolutely no materiality to this case, bearing on any question of jurisdiction involved in this matter.

* * * * * *

The Court: I will shorten this up. I will admit these de bene. If I think they are of any consequence and bear on the questions, they will be considered. Otherwise, they will be rejected, this correspondence.

Mr Sulloway: Subject to our objection, if they are considered.

* * * * * * * *

The Court: They are in subject to use if the Court deems they are material.

Mr. Sulloway: Yes, and subject to our exception if they are used.

The Court: Yes.

The Clerk: Received and marked Defendant King's Exhibit EE de bene.

(Questions by Mr. Sanders)

XQ. Now we were previously referring, Mr. Laramie, to correspondence in connection with the application for registration of Super-Adit on January 22, 1953. Now what is the next date upon which Nuodex registered any of its products?

A. March 23, 1953.

XQ. And what was registered on that date?

A. Nuodex 84.

XQ. 84?

A. 84.

XQ. And in connection with this registration, do you have a letter under date of March 17, 1953, from Mr. Zabriskie, the attorney for Nuodex?

A. Yes, sir.

XQ. And may I have that letter, please?

(Letter handed to Mr. Sanders by the witness.)

Mr. Sanders: We offer the letter.

(Letter handed to Mr. Sulloway by Mr. Sanders.)

Mr. Sulloway: We object, Your Honor.

The Court: Same reason?

Mr. Sulloway: Yes, same reason, not material to the question of jurisdiction.

* * * * * *

The Court: Well, will you state it for the record, so we won't have any doubt what this is offered for.

Mr. Sanders: The correspondence between Nuodex and the Department of Agriculture clearly indicates the doing of business in the State of New Hampshire, and Nuodex's recognition that the doing of such business was such as to require Nuodex to comply with the registration mandate, in turn required by the provisions of Chapter 311 of the New Hampshire Session Laws of 1949.

Mr. Sulloway: I would like to object for the same reasons as set forth for admissions to this letter. I would like to point out that the mere shipment of goods into the state of New Hampshire would not be in itself doing business and could not be an admission of doing business of that character.

The Court: Same ruling, and same exception.

The Clerk: Received and marked Defendant King's Exhibit GG de bene.

Mr. Sulloway: Exception.

The Court: Noted.

(Questions by Mr. Sanders)

XQ. Now what is the next registration by Nuodex after March 23, 1953?

A. June 18, 1953, Super-Adit retail.

XQ. Super-Adit what?

A. Retail.

XQ. And in connection with this registration, do you find any correspondence from the Nuodex attorney?

A. May 26, 1953.

XQ. Could I see that, please?

(Letter handed to Mr. Sanders by the witness.)

And have you now produced a letter under date of May 20, 1953, from Mr. Zabriskie to the Agriculture Department with attached product data sheet and labeling together with the department's reply under date of May 26, 1953?

A. Yes, sir.

Mr. Sanders: We offer this correspondence.

(Letters handed to Mr. Sulloway by Mr. Sanders.)

Mr. Sulloway: We object for the same reasons already stated.

Mr. Sanders: We make the offer on the same basis previously stated.

Mr. Sulloway: May we have an exception if it is received?

(Letters handed to the Court by Mr. Sanders.)

The Court: All right, same ruling.

The Clerk: Received and marked Defendant King's Exhibit HH de bene.

Mr. Sulloway: Received under the same ruling, Your Honor, and subject to our exception?

The Court: Yes.

(Questions by Mr. Sanders)

XQ. Now, Mr. Laramie, what is the next registration of any product sale in New Hampshire by Nuodex after June 18, 1953?

A. August 20, 1953.

XQ. And on that date what product did Nuodex register with your department?

A. Noudex 100 WD.

XQ. Do you have any correspondence in connection with that registration?

A. No, sir.

XQ. Very well. What was the next registration of any product by Nuodex?

A. January 5, 1954.

XQ. And on what date did this registration occur?

A. January 5, 1954.

XQ. And what product was registered on this date?

A. Three. Nuodex 100 WD, Nuodex Super-Adit, and Super-Adit retail, Super-Adit Industrial.

XQ. On this date three products were registered, first being?

A. 100 WD.

XQ. Second?

A. Nuodex Super-Adit industrial.

XQ. Third?

A. Super-Adit retail.

XQ. In this instance do you for the first time have the original application of Nuodex; in other words, is this the first original application which, under your rules concerning the preservation of your records, has in fact been preserved?

A. As far as registration application, you mean?

XQ. Yes?

A. Yes, sir.

XQ. All right. Now at the bottom of this registration, or application for registration, by Nuodex, is there any reference in the application to Nuodex 84, which in previous years have been registered?

A. Not to be renewed, Nuodex 84.

XQ. That is set forth in the application?

A. Yes, sir.

XQ. All right.

Mr. Sanders: First of all we will offer the application. We offer the original application.

* * * * * *

The Clerk: Received and marked Defendant King's Exhibit II . . . . .

* * * * * *

(Questions by Mr. Sanders)

XQ. Did industrial labeling, retail labeling and a product data sheet for both Super-Adit retail and Super-Adit industrial, and a product data sheet for Nuodex 100 WD accompany this last application?

A. I would say that Super-Adit retail and Nuodex 100 WD did.

Mr. Sanders: We offer the product data sheet and attached labeling with reference to Super-Adit retail and Nuodex 100 WD.

* * * * * *

The Clerk: Received and marked Defendant King's Exhibit JJ.

(Questions by Mr. Sanders)

XQ. Now as was previously pointed out in the application for registration, which has been marked Exhibit II, there was a statement on the application, "Not to be renewed, Nuodex 84." Do you find any subsequent application from Nuodex for the registration of Nuodex 84?

A. Yes, sir.

XQ. And under what date is that application?

A. July 29, 1954.

* * * * * *

XQ. Was there product data and labeling attached to this application?

A. Yes, sir.

Mr. Sanders: I offer the attached application with attached labeling and product data.

(Document handed to Mr. Sulloway by Mr. Sanders.)

Mr. Sulloway: No objection.

(Documents handed to Mr. Brown by Mr. Sanders.)

The Clerk: Received and marked Defendant King's Exhibit KK.

The Court: What's the next question?

(Questions by Mr. Sanders)

XQ. Now what was the next registration by Nuodex?

A. The date?

XQ. Yes, date and products?

A. January 13, 1955.

XQ. And on that date what was registered by Nuodex?

A. Nuodex 100 WD, Nuodex Super-Adit, industrial, and Super-Adit, retail.

XQ. Was there any reference in that application to Nuodex 84?

A. Not to be renewed, Nuodex 84.

XQ. And, similarly, is there attached to this application any material?

A. No, sir.

Mr. Sanders: We offer the application.

(Document handed to Mr. Sulloway by Mr. Sanders.)

Mr. Sulloway: Your Honor, we now have a reference to something which happened after the suit was brought.

The Court: What is the date of it?

Mr. Sulloway: This is January 13, 1955.

The Court: I don't see how that is material, Mr. Sanders. How is it?

Mr. Sanders: I believe the course of business from the past up to the present time is material under the law. I understand there are cases even up to the time of hearing.

The Court: It may be admitted.

Mr. Sulloway: Exception, on the grounds it is subsequent to the bringing of the action.

(Document handed to Mr. Brown by Mr. Sanders.)

The Clerk: Received and marked Defendant King's Exhibit LL.

(Questions by Mr. Sanders)

XQ. And finally, Mr. Laramie, is there any further application for registration by Nuodex?

A. October 11, 1955.

XQ. And for registration of what product?

A. Nuodex 84.

XQ. And is there any accompanying data attached to this application?

A. Yes, sir.

XQ. What does it consist of?

A. Label of Nuodex 84?

Mr. Sanders: We offer the application and the attached data.

(Documents handed to Mr. Sulloway by Mr. Sanders.)

Mr. Sulloway: We object to this on the same grounds, dated October 11, 1955, a very recent date.

The Court: Admitted on the basis of continuity.

Mr. Sulloway: We have an exception.

The Court: Yes.

(Documents handed to Mr. Brown by Mr. Sanders.)

The Clerk: Received and marked Defendant King's Exhibit MM.

Mr. Sanders: You may inquire.

(Questions by Mr. Sulloway)

XQ. Mr. Laramie, did you make up a list of these various registrations and certify to it?

A. My secretary made this up, and I checked it this morning and signed it.

XQ. And is it correct?

A. Yes, sir, it is.

Mr. Sullaway: We offer it, Your Honor.

* * * * * *

The Clerk: Received and marked Nuodex Exhibit D.

Mr. Sullaway: That is all, as far as I am concerned, with this witness.

* * * * * *

Mr. Brown: Mr. Cookingham, please.

Howard C. Cookingham

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

(Questions by Mr. Brown)

Q. Would you state your full name and address for the record, Mr. Cookingham?

A. Howard C. Cookingham, Hopkinton, Massachusetts.

Q. And what is your occupation, sir?

A. Divisional manager of the D. H. Litter Company.

Q. And divisional manager with responsibility in what area?

A. New England sales area.

Q. Among the principals for whom you act, is Nuodex Products, Inc.?

A. We are sales representatives for the Nuodex Products Company within that area.

Q. Are you aware of the content of Mr. O'Neil's March 10, 1955, letter to Mr. D. H. Litter?

A. No, sir, I am not.

Q. You have not been advised specifically as to what the terms of the arrangements between Nuodex and D. H. Litter are?

A. No, sir, I am not.

Q. And you have been with D. H. Litter for how long?

A. Approximately twenty years.

Q. Do you know what changes were made, if any, in the arrangement under which you act for Nuodex between the letter of August 23, 1954, which became effective October 1, 1954, and March 10, 1955?

A. As far as my operational methods are concerned, there have been no changes.

* * * * * *

Q. Mr. Cookingham, your deposition was taken in this case last spring, was it?

A. Yes, sir.

Q. Do you recall at that time that we inquired of you concerning a situation at Great Falls Bleachery which involved your operation and Mr. Galbraith of Nuodex's operation?

A. Yes, sir.

Q. With reference to these papers which I put before you, would you tell the Court briefly and in general terms just what that situation was and what was done?

A. In early April—

Q. Go ahead.

A. In early April, 1953, we were selling Nuodex 100 to Brunsene Company, a division of H. M. Sawyer Company in Watertown, Massachusetts. They contacted our office, the D. H. Litter Company office, in regard to a problem they were having on mildew in a certain fabric to meet a Government specification. I requested technical assistance from Nuodex, and they furnished it in the form of Bruce Galbraith, who called with me on the Brunsene division, I believe, on April 6 or 7, I'm not sure of the exact date, at which time we discussed with them the particular problem they were having. As a result of this discussion, they requested that we go to Great Falls Bleachery, and I believe the man was Mr. Hainsworth that they suggested we see, because Great Falls Bleachery were either treating or contemplating treating the fabric for Brunsene. We went to Great Falls Bleachery, Mr. Galbraith and I, and talked with Mr. Hainsworth on April. In this file there is a copy of a call report written by Mr. Galbraith dated April 8.

Q. Now that particular report by Mr. Galbraith was made with a copy to Mr. Minich, the president of Nuodex, or the then vice-president of Nuodex?

A. According to the copy which was received in our office which is in evidence here, a copy of this report went to Mr. Minich.

Q. Yes, sir. Now go ahead, Mr. Cookingham, as you were doing. On the 24th of April, do you have an inter-office memo from Mr. Galbraith of Nuodex to yourself?

A. On April 24, there is a letter addressed to the D. H. Litter Company, Allston, Massachusetts, under the title Great Falls Bleachery and Dye Works, which gives information on the heating temperatures of Nuodex 100 WD in the treatment of fabric.

* * * * * * *

Q. And that is on a Nuodex sheet entitled inter-office correspondence?

A. That is correct.

Q. What is the next event in that particular problem?

A. The next event in this particular problem is not in this file. The next event in this particular problem is an order which we received in our office on April 8, I believe, or the 9th, by mail, which is in the —the order isn't in evidence, I don't think, but the invoice covering the shipment is in evidence.

Q. Well that particular order is before the technical report from Mr. Galbraith to you and immediately after your visit up to Great Falls, is that right?

A. The order was received in our office, I believe, the day after our visit there. Now I am not positive of that.

Q. And then subsequently, of course, you had Mr. Johnson stay in contact with Great Falls from time to time as it was convenient with his work in order to follow up that account?

A. After my original visit to Great Falls, the account was turned over to Mr. Johnson to handle.

Q. And in December of 1953, on December 3, Mr. Brumberger, one of the Nuodex top-flight executives, was in contact with that same account, writing to Mr. Colburn, is that right?

A. Not according to this file.

Q. Well, let's say under date of December 17, 1953?

A. Under date of December 17, 1953, there is a letter in this file from Mr. Brumberger to Mr. Colburn in reply to Nuodex's letter of December 15.

Q. At that point he is writing about Nuodex products and his letter indicates that he was sending promotional literature and technical data into New Hampshire on the Great Falls Bleachery account, is that right?

A. That is correct.

Q. And Mr. Houston was correct the other day when he suggested to me that the problem with respect to that January specification that he was active on was not the same problem that you and Mr. Galbraith worked on?

A. That I do not know.

Mr. Brown: We offer this file of correspondence with respect to the Galbraith trip to New Hampshire.

* * * * * * *

The Clerk: Received and marked Plaintiff's Exhibit No. 25, produced by the defendant Nuodex.

(Questions by Mr. Brown)

Q. That particular transaction, Mr. Cookingham, was the one episode that you folks recall where one of Nuodex's technical people came into New Hampshire giving you an assist on a problem with a New Hampshire account, is that right?

A. That is correct, yes.

Q. As far as you are aware, there were no other such episodes since you have been active in this field?

A. There has been no other episode since 1950, to my knowledge.

Q. And I don't know that I asked you this: how long have you been operating the Boston office of D. H. Litter Company?

A. From 1938 forward.

Q. How long have you been handling Nuodex products?

A. As an employee of D. H. Litter Company, Nuodex has been one of our principals for whom we have been selling ever since I have been with the company, which I believe was early 1935.

Q. Now in your experience, and as you understand your own operation. Litter supposedly gets a commission on all sales within your territory, regardless of whether or not your personnel happen to activate the order?

A. That is correct.

Q. So that the fact that you got commissions on all the sales of Nuodex products in New Hampshire doesn't mean that you actually activated that business at all?

A. Not in receiving the commissions in themselves, does not mean that we activate it, no.

Q. There isn't any question, is there, Mr. Cookingham, but what D. H. Litter Company is doing business in New Hampshire; you acknowledge that as so?

Mr. Sulloway: Well, the employees of the Litter Company are acting to make sales. Now it depends on what you call doing business.

The Court: It depends on what Litter's business is.

Mr. Sulloway: Yes, Your Honor.

The Court: It is a commission agency, isn't it, a commission house?

The Witness: We are representatives for manufacturers and are paid on a commission basis as a corporation.

The Court: What is your business, then?

The Witness: Our business is selling raw materials to industrial users, primarily, on a straight commission basis paid to the corporation, not to our individual salesmen.

The Court: Now the question is whether you are pursuing your business in New Hampshire.

The Witness: I am not qualified to answer the question, I don't think.

(Questions by Mr. Brown)

Q. Mr. Cookingham, part of your responsibility on the Nuodex account is to cover New Hampshire as part of your territory, right?

A. New Hampshire is within our territory as assigned to us by Nuodex, that is correct.

Q. And in addition to that, the other six principals for whom you act as agent in the same sense also have you cover New Hampshire for them, right?

A. That is correct.

Q. So that your own operation does involve Litter Company

doing business in New Hampshire, isn't that so; don't you know that you do business up here?

A. We solicit business in New Hampshire. I am not a lawyer. I don't know whether that constitutes doing business in New Hampshire or not.

Q. Very well, sir. You solicit business up here?

A. We solicit business up here by our salesmen paid by the company.

Q. Regularly?

A. The records show how regularly it is.

Q. If a product is sold in this area which does not happen to be stocked at your Massachusetts warehouse or at the New Jersey factory facilities of Nuodex, are there other warehouses which are available from which to withdraw stock to meet your orders?

A. Talking about Nuodex now, or general operations?

Q. Nuodex only?

A. Nuodex only?

Q. Yes?

A. If we receive an order from an account that has an open account with Nuodex from a credit point of view, and we have the material, and the material is in the Medford warehouse, it will be shipped from Medford. If not, the order will be forwarded to Nuodex Products Company in Newark. Where they ship from, I have no control of.

Q. I appreciate that. But I am asking you, sir, whether to your knowledge there are other warehouse stocks available to meet such orders, if they are out of the particular item both in Elizabeth and in your Medford warehouse?

A. I am not qualified to answer the question. I suggest you ask one of Nuodex's people where else they would ship from.

Mr. Brown: May I ask to have produced the April 17, 1953, invoice to Resin Research, covering a Cobalt order?

* * * * * *

(Invoice handed to Mr. Brown by Mr. Sulloway.)

(Questions by Mr. Brown)

* * * * * *

Q. I am asking you again, did Litter Boston have anything to do with this one?

A. No, this order is from Resin Research Corporation to San Francisco, which, as I understand it, is a division of Resin Research here in Manchester, or a company of the same name, I don't know which it is.

Q. So that if this invoice was brought up here and submitted to Mr. Sanders and myself as being part of New Hampshire business, somebody made a mistake?

A. I would say that is correct.

* * * * * *

Mr. Brown: If I may at this point, Your Honor, on the first page of Exhibit No. 3 for identification, the third item from the bottom indicating that on February 5, 1950, a shipment of Cobalt was made to Putnam Manufacturing—1951, I mean—a shipment of Cobalt went to Putnam, it has been suggested to have been an error on our part, and we have not been able to find the document that that was with reference to, and I would like to withdraw from that exhibit the suggestion that that shipment was made on February 5.

Mr. Sulloway: I don't understand that that exhibit is in evidence. We put in evidence all the invoices, and the reason we didn't agree to that exhibit was that it was incorrect, and so the invoices were produced.

Mr. Brown: And, if it please the Court, with those two corrections, I would like now to ask that the marking for identification be stricken and Exhibit No. 3 be accepted as a full exhibit evidencing these transactions.

Mr. Sulloway: We object to that . . .

* * * * * *

Mr. Brown: May I suspend with this witness and put Mr Johnson back on the stand?

The Court: Yes.

Mr. Brown: Mr. Johnson?

Herbert M. Johnson

recalled as a witness in behalf of the plaintiff, having been previously sworn, further testified as follows:

Further Redirect Examination

(Questions by Mr. Brown)

Q. You have been previously sworn, Mr. Johnson. Would you be seated?

Do you know in what file your call reports for your New Hampshire operations are kept?

A. That would be 1950.

Q. From 1950 through May of 1955?

A. I think all that material has been put in as evidence.

* * * * * *

Mr. Ransmeier: We verified, I believe, the call reports for everything except the first three visits in 1950, and those we were unable to find any record for, but we agree that they have been made.

The Court: Where are these call reports, do you know?

Mr. Sulloway: There are only three that are not found, and we agreed that those were made. That appears on the record.

The Court: Where are those that were found?

The Witness: Right here.

The Court: All of them?

The Witness: 1950.

The Court: Is that what you want?

Mr. Brown: That is where I am going to start, start in 1950 and come straight forward. These are the ones the gentlemen said were in evidence, which are not. If I may proceed?

Mr. Sulloway: You will find there is an entry on the record that we admitted that these items referred to were made.

The Court: You mean 1950?

Mr. Ransmeier: We admitted, but have no way of verifying. We never found those three.

The Court: Do you need to go through those?

Mr. Brown: I am not at all sure admissions of this type carry much weight. Is it admitted that on March 20, 1950, Mr. Johnson did discuss Nuodex driers at Milford Paint?

Mr. Sulloway: Yes, it is.

Mr. Brown: And is it admitted that on May 4, 1950, he visited Milford and discussed Nuodex driers?

Mr. Sulloway: Yes.

Mr. Brown: And is it agreed that on the 27th of September at Resin Research he discussed Nuodex No. 6, whatever that may be?

The Witness: Cobalt, six per cent.

Mr. Brown: The witness says that would be Cobalt, six per cent, is that right, Mr. Johnson?

The Witness: That's right.

(Questions by Mr. Brown)

Q. Did you on that occasion discuss that at Resin Research, according to your call report?

A. Yes, I did.

Q. Now those are the only visits in 1950 that your call reports show you made. You say you have a call report which contains some notation about Nuodex Company's materials?

A. That's right.

Q. Cobalt drier?

A. Yes, that's right.

Q. Now in 1951, Mr. Johnson, would you see whether you can find your Jaunary 20 call report at Nashua Gummed and Coated Paper Company?

(Witness looking through file.)

A. Yes.

Q. Do you have it?

A. Right here. What date was that, sir?

Q. January 20?

A. November 20, 1951.

Q. This is November 20. How about finding one for January 20?

A. I don't believe there is one here. It is not in this 1951 file.

Q. Well, do we have a correspondence file for 1951?

A. That is what this is.

Q. Are you sure it isn't in there?

A. No, it isn't in here, not so far as I can see.

Q. Have you looked carefully?

A. These are all separated. This is for Nashua Corporation.

Unless it is filed with some other—under some other company. No, it isn't in this folder.

Q. Well on this one that you do find, which appears to be 11-20-51?

A. Yes.

Q. You refer to their use of Nuodex 84?

A. That is correct.

Q. And that is the only call report that is in this file on Nashua Corporation in 1951?

A. That is correct.

Q. And in the 1951 tabulation, on page 3, there is no reference to a 11-20-51 visit at Nashua, is that right?

A. That is correct. Must be an error.

Q. It is a trip that was made, but instead of it being made on 1-20, it was on 11-20, is that it?

A. That is correct.

Q. But the trip was made?

A. Yes, that's right.

Q. And Nuodex products were subject to the call, amongst other things?

A. That's right, Nuodex 84.

Q. All right. Now would you say whether on May 10 you visited Manchester Narrow Fabrics and Milford Paint and reported the results of that trip to Nuodex?

The Court: Wouldn't it be shorter to ask him then question him about it? If he says no or yes, that is the problem solved. Your question is whether he discussed it, isn't that right?

Mr. Brown: That is correct.

The Court: Do you need to look at every report in order to verify that?

The Witness: I can't remember, Your Honor, that far back, 1951.

The Court: All right, go ahead.

The Witness: On May 10, 1951, I called on Manchester Narrow Fabrics Company, Manchester, New Hampshire,

to see if this company was going to do any treating of webbing on Government contract.

(Questions by Mr. Brown)

Q. Without the detail, Mr. Johnson, was the purpose to find out whether or not they were going to be a customer for Nuodex?

A. If they were treating on Government contract, they would be a prospect.

The Court: For Nuodex material. We went all over that before. Nothing came of it, anyway. No order came from it?

The Witness: That is correct.

(Questions by Mr. Brown)

Q. You did report back to Nuodex what you found?

A. I don't know.

Q. Your call report goes back to them, doesn't it?

A. No, the original of my call reports go to my New York office, and a carbon copy is kept in our Boston office.

Q. You just called on them, and didn't let Nuodex know what the result of it was at all?

A. No, I didn't.

Q. All right, what happened at Milford Paint the same day?

A. Here we are, May 10, 1951.

Q. Did you discuss Nuodex products?

A. I discussed Nuodex driers and urged Milford Paint to order materials when they needed them.

Q. And did you report that situation back to Nuodex or not?

A. No, I didn't.

Q. You just filed your written report?

A. I sent the original to our D. H. Litter New York office, and the copy was kept in my file in our Boston office.

Q. You asked for information from New York on one of the problems there, didn't you?

A. That was concerning material manufactured by Falk and Company, sir.

Q. All right. On August 16, would you check and see whether you visited Milford Paint and Miljo Chemical about Nuodex

products? I am not interested in the detail, Mr. Johnson.

A. No, I understand that now. August 16?

Q. Yes, sir?

A. I have one, a visit here for August 20.

Q. Well, I will come to that. Do you have August 16?

A. I don't find any report for August 16.

Q. For either account?

A. Well, I am talking about Milford Paint Works. I have no record of any on August 16 of Milford Paint.

Q. Well let's go to the August 20 one for the moment. You don't find a trip on August 16 at all?

A. No. No call on Milford Paint Works on August 16.

Q. What about Miljo?

A. I was just looking for them. There doesn't seem to be anything in here on Miljo. I don't believe there is anything in this folder on Miljo. At least I can't find it.

Mr. Brown: Do you gentlemen happen to know where your August 16 call reports are on those two accounts? Have they been pulled for some reason?

The Witness: That may have been put in as evidence. I really don't know.

(Questions by Mr. Brown)

Q. Let's go to August 20?

A. At Milford Paint?

Q. Yes?

A. August 20, I called on Milford Paint, and apparently I checked—

Q. Nuodex drier?

A. —whether they needed any Nuodex driers.

Q. So that on that one, you actually discussed Nuodex?

A. That is correct.

Q. The 21st, the next day, did you visit Putnam Manufacturing over in Keene?

A. August 21, I called on F. A. Putnam, Keene.

Q. Did you talk with them about Nuact paste?

A. That is correct.

Q. On November 15, Milford Paint, did you visit down there on November 15?
A. What was the date?
Q. November 15?
A. I seem to have only here November 20. It is October 15?
Q. October 15.
A. All right.
Q. Did you discuss any Nuodex products on that occasion?
A Yes.
Q. Now November 21, Milford Paint?
A. Yes. November 20, I think.
Q. All these dates are in longhand, and all the reports are in longhand, is that correct?
A. Yes.
Q. Hard to read?
A. Carbon copies.
Q. What did you say, November 21?
A. November 20.
Q. And on that occasion you say, "We will get drier business"?
A. That's right.
Q. And that of course is talking about Nuodex getting it?
A. About D. H. Litter getting it.
Q. A Nuodex account?
A. Nuodex driers, yes.
Q. All right, now, let's—I guess we get into 1952. We have only got three years to go.
Now would you look at Milford Paint on February 20?
A. February 26.
Q. They had enough driers?
A. That is February 26.
Q. Well, it is either a zero or a six.
A. It is a six, February 26.
Q. They had enough driers on that occasion, so you couldn't sell any, right?
A. Yes, that's right.
The Court: Is that Milford?
Mr. Brown: Yes, Your Honor.

The Witness: I checked on whether they needed any Nuodex driers.

Questions by Mr. Brown:

Q. All right, now, February 21, were you at New England Paint Works at Goffstown?

A. February 26, it is.

Q. You say that is 26?

A. Yes, that's right.

Q. All right. You are at Goffstown?

A. That is correct.

Q. About Nuodex products, among others?

A. I gave them data on Nuodex products.

Q. All right. Are there two reports on this Goffstown situation on that date?

A. No, that is the only one.

Q. That is the only one?

A. That is correct.

Q. And you are sure the one you read is the 26th and not the 21st?

A. That's right, that is a six.

Q. What else do you have in here on New England Paint Works; anything?

A. No, that is all.

Q. That is all there is in this file?

A. One call report.

Q. All right. Now on February 27, did you visit Nashua Gummed and Coated Paper?

A. That is February 26 again.

Q. You make that out to be 26?

A. That is a two, 26. That is my own writing.

Q. All right, go ahead. Did you talk about Nuodex down there then?

Mr. Sanders: Where is this, Mr. Brown?

Mr. Brown: This is at Nashua.

The Witness: Yes, I talked to Mr. Davis, the chemist, and I believe the chief chemist, and I was sending them a sample of Nuodex material.

(Questions by Mr. Brown)

Q. You say they will send you a sample of Nuodex?
A. Cobalt, six per cent.
Q. Is that Cobalt six, or copper?
A. Cobalt.
Q. And such a sample was sent February 11, 1952?
A. That is correct.
Q. The shipment date is February 29, is it?
A. Wait a minute. Well, that has been taken off. That is in evidence. But it was ordered on the 28th, shipped on the 29th.
Q. Was there another one here that appears to have been shipped February 11?
A. Yes, that's right.
Q. So there were two samples, one February 11 and one the 28th, is that it?
A. Yes. I think originally he asked me to send him a small sample, and it went in there, and he asked me to send an additional amount.
Q. All right. Now on June 11: Milford Paint?
A. June 11, that is correct.
Q. And you were talking about Nuodex products down there then?
A. That is correct.
Q. Ordering Alcoa, Nuodex and Falk, is that what it says?
A. Yes.
Q. On that date, did you visit anybody else?
A. June 11? I don't know. I would have to look all through it. Do you have any record?
Q. Look, I don't rely on records any more. You don't know, do you?
A. I don't know.
Q. Let's take a look at Milford Paint, June 18. I'm sorry, that wasn't a call of yours. July 10?
A. July 10, yes, I have a report here.
Q. And on that occasion—
A. I again checked. "Need for Nuodex driers."
Q. So you discussed Nuodex on that occasion?

A. Yes.

Mr. Sanders: With whom, Mr. Brown?

Mr. Brown: On the 10th. We didn't indicate it on the list. Nuodex was discussed.

(Questions by Mr. Brown)

Q. Now on the next date I have is July 26, Nashua Corporation, that you dropped a letter up to them telling them that samples are going to be sent. Did that happen, did you write to them on the 26th of July, to Nashua, or would that be in another file?

A. I don't have any record of writing to Nashua.

Q. Let's take a look at August 20?

Mr. Sanders: If I may interrupt you, Mr. Brown, I think I can clarify something that caused you trouble a little while ago. I think you will find misfiled in this file an actual call made on August 16, 1950, for Milford Paint, which has been omitted from your list.

(Questions by Mr. Brown)

Q. Would you look and see if that is so; would you have a 1950 call report for Milford Paint, August 16?

A. No, I don't, I have the August 20, on 1950.

Q. Another one in there, misfiled there?

A. No, I don't believe so. It is not here any longer, Mr. Sanders. Nothing here on that.

Q Let's go back to August 20. You did find yourself at Milford Paint on August 20, 1952?

A. August 20, 1952, I was at Milford Paint.

Q. Discussing Nuodex again; order Nuodex and Alcoa?

A. Well, it is just a point. I may not have discussed Nuodex. I mean, if they had been ordering, I may say at the end of my report that they order as they need it.

Q. Look, when they order when needed, you ask them?

A. When order is—however, I will say I discussed Nuodex.

Q. The next one I have is 1953, February 10, Nashua Corporation. Now would that be in that file?

A. That is the 1952 file, so I don't believe it would be in here.

Q. It might be, but it shouldn't be, is that correct?

A. That is correct.

(File handed to the witness by Mr. Brown.)

Q. Would you just let me know whether on February 10 you visited the Nashua Corporation about Nuodex 84?

A. I say here they order as needed.

Q. And when you are reporting on the status of it, did you check the status while you were there?

A. I don't believe I did.

Q. You just go into an account and you don't bother to say anything about it but then put on your call report something about the particular order situation, is that it?

A. That's right. They order that material as they need it in very small quantities, comparably speaking, and I might not ask them every time about it, because they only order a couple times a year. However, I don't know as it makes any difference.

Q. I see.

* * * * * *

Q. But your call report does indicate?

A. It mentions Nuodex 84.

Q. All right. Now on the same date, Milford Paint?

A. Yes.

Q. And it says there, there can't be any question about this one?

A. No. I rediscussed Super-Adit.

Q. Rediscussed Super-Adit?

A. That is correct.

Q. And Nuodex driers?

A. I don't mention driers, I don't believe. I just say they have enough materials on hand, not saying what materials.

* * * * * *

Q. February 10, are we talking about?

A. February 10, 1953. That could be Alcoa material.

Q. And it could be Nuodex driers?

A. It could be; that's right. It could be anything we sell.

Q. Now on the same date, did you visit International Shoe?

A. I don't see anything in this file about International Shoe.

Q. Well, do you recall telling us on your deposition that you visited International Shoe but couldn't find your call report on International Shoe?

A. I don't recall it, but it is very possible.

Q. Well, let me show you your answer to Interrogatory 615 at page 90 of your deposition.

(Deposition shown to the witness by Mr. Brown.)

Now what did you say then as to the accounts you called on on February 10?

A. According to that, I called on them.

Q. Nashua Corporation, Milford Paint, International Shoe—

A. Hermsdorf and New England Paint.

Q. In Goffstown?

A. In Goffstown, correct. Apparently, that report was missing. I knew I called on them.

Q. Now at New England Paint, do you have a call report in there on New England Paint?

A. No, I don't.

Q. Do you know from your own personal recollection that you were over there discussing Nuodex?

A. Not from my recollection, but I just read it. You mean that same day?

Q. The only reason for your being over there, actually, was Nuodex, wasn't it?

A. Where was that?

Q. At New England Paint at Goffstown?

A. No. As a matter of fact, my memory of the reason for going there was Alcoa Aluminum.

Q. You also visited them to see if they might become a customer for Nuodex?

A. That is correct.

Q. And discussed Nuodex with them on that trip, undoubtedly?

A. Very likely, yes.

Q. All right, probably did. And you were down at International Shoe on that occasion, amongst other things, following up Mr. Brumberger's earlier contact with them for Nuodex, right?

A. What date was that, sir?
Q. February 10?
A. 1953?
Q. Yes, sir?
A. As far as I can recall, I never called on International Shoe to follow up anything that Mr. Brumberger did; as far as I can recall—well, that is all, I just can't recall, that is all.
Q. March 9, did you visit Putnam?
A. March 9, 1953, I visited F. A. Putnam in Keene.
Q. They are using the Nuodex driers, are they?
A. I discussed Nuact paste and gave a sample, and so on. That is a Nuodex material.
Q. And you also note, do you not, that they are using the driers?
A. They order Nuodex driers as needed, that is correct.
Q. All right. Now March 26, did you visit Nashua Corporation?
A. That is correct.
Q. Did you have any discussion down there about Nuodex 84 on this occasion?
A. Again, at the end of the report, I say, "Order Nuodex 84 as needed."
Q. Whether you actually had a discussion about their use of it at that time, you don't have any recollection, is that right?
A. That is correct, but it is mentioned in the report.
Q. How about Milford Paint, the same day, Mr. Johnson, still March 26?
A. March 26, 1953, I called on Milford Paint and again discussed Super-Adit and also mention that they have enough Nuodex items on hand.
Q. So you reviewed all of the Nuodex items, and you also gave them another pitch on the Super-Adit?
A. I gave them a pitch on Super-Adit and asked them if they needed Nuodex driers.
Q. May 28, Nashua Corporation?
A. May 28, 1953, I called on Nashua Corporation.
Q. You have got Nuodex 84 in there again, have you?

A. It is mentioned that they order it when it is needed, that is correct.

Q. That is in the middle of the report rather than being at the end?

A. That is in the middle.

The Court: What am I to understand from that, order as needed? You simply attain that information, or attempt to make a sale?

The Witness: No, Your Honor, it is an item they only use a couple of drums a year. And I know that in the particular product, if they make that product, they order Nuodex product when they need it.

The Court: The point of it is, was your visit, did it have some contribution to your employer or to Nuodex, or you just got the information "ordered as needed"?

The Witness: Well, I know they order it as needed, and as a general rule I wouldn't ask them for an order.

The Court: Well, what is the significance of the visit?

The Witness: I have called in regard to other companies that we represent, you see. I mean, we represent about seven other companies, and very often the prime purpose of my call might be in regard to one of these other companies, and of course I either ask whether they need any of the other materials we sell or something like that, so I say in the report, "order as needed," even if they don't ask, I know they order when needed.

The Court: Other materials, you mean, includes Nuodex?

The Witness: Yes.

(Questions by Mr. Brown)

Q. On this Nuodex 84, Mr. Johnson, Nuodex from time to time was fearful that this particular account was going to stop using it, didn't you know that?

A. I didn't know that Nuodex thought they were going to stop using it, unless I had reported to Nuodex.

Q. This is the item that they are always late registering in New Hampshire, isn't it, 84?

A. I don't know anything about the registration.

Q. All right.

A. And from the amount of material that Nashua buys, I shouldn't think they would be afraid of losing it.

The Court: Get on to the next question.

(Questions by Mr. Brown)

Q. On June 3, did you visit Great Falls Bleachery, June 3, about Nuodex 100?

A. There doesn't seem to be anything in this file on Great Falls. That may have been put in evidence for something else.

Q. Well, all right, let's see whether you visited Miljo Chemical on June 3?

A. I believe that was put in evidence also. That was attached to a letter that was put in evidence, or something to that effect.

Q. How about General Electric, did you visit them on that date?

A. June 3, I called on General Electric Company in Somersworth, New Hampshire. That call was made entirely in behalf of the Aluminum Company of America. No mention made of Nuodex material at all.

Q. On that call to International, Plaintiff's Exhibit No. 15 carries your call report, does it?

A. November 15.

Q. Or is that a different one?

A. Which one is that?

Q. I guess maybe that is a different one. Let's just hold that. You don't find in the file before you either Miljo, General Electric or Great Falls on June 3?

A. I found General Electric on June 3.

Q. Page 82 of your deposition, Mr. Johnson, do you say with respect to June 3, 1953, that you called on Miljo, General Electric and Great Falls?

Mr. Ransmeier: What interrogatory?

Mr. Brown: 553.

The Witness: That is correct.

(Questions by Mr. Brown)

Q. Those are the New Hampshire accounts you called on that day?

A. Yes, that is right.

Q. And at Great Falls, what did you tell us on your deposition you did?

(Deposition shown to the witness by Mr. Brown.)

A. I checked on the Nuodex 100.

Q. All right.

Mr. Upton: Is that what he did? He said he did it.

(Questions by Mr. Brown)

Q. Did you do what you told us in your deposition you did?

A. Oh, of course.

Q. Now how about June 7, Putnam Company?

The Court: July 7, you mean, don't you?

Mr. Brown: Thank you, Your Honor.

(Questions by Mr. Brown)

Q. July 7, Putnam?

A. Yes.

Q. Did you discuss Nuodex Zirconium over there that day?

A. Yes, I discussed Nuodex materials there.

Q. And in addition to the one I say you discussed, you discussed another one?

A. Zirconium and Cerium, yes.

Q. All right. What about the 15th of July, the same place— I'm sorry, that is a shipment. You didn't have that.

August 13, did you go to the Nashua Corporation on that occasion?

A. Yes, I did.

Q. And got a little notation about Nuodex 84 on that call report?

A. Yes, order Nuodex 84 as needed.

Q. That is another one where you don't know whether you talked about it or not, is that right?

A. That is correct. I may or may not have.

Q. Milford Paint, same day?

A. August?

Q. August 13?

A. Yes, August 13, 1953, I called on Milford Paint and discussed Nuodex material.

Q. Not only discussed it, but you got, apparently, the promise of an order, didn't you?

A. I wrote that they will order Nuodex Cobalt soon, that is correct.

Q. All right. Now on the same day, did you go to International Shoe and Hermsdorf in New Hampshire?

A. That is August 13?

Q. Yes?

A. There doesn't seem to be anything in the file on those.

Q. Well, I refer to your deposition, Mr. Johnson, page 78, the answer to Interrogatory 523, did you tell us then that you visited Nashua Corporation, Milford Paint, International Shoe and Hermsdorf Fixtures on this trip of August 13?

(Deposition shown to the witness by Mr. Brown.)

A. That it correct.

Q. And did you do so?

A. Yes, sir, I did.

Q. All right. Now, August 31?

A. You didn't ask me if I discussed Nuodex materials.

Q. You bet your life I didn't. You didn't, did you?

A. Which accounts?

Q. To Hermsdorf?

A. No, I didn't.

Q. Never did?

A. No, that is right.

Q. And the other one is International Shoe, do you know whether you did International Shoe or not?

A. I don't know. I mean, I wouldn't know unless I had the report here.

Q. And you don't have the report here, do you?

A. No, I don't believe I did. I think there was only about one time that I did there.

Q. All right.

A. I think that is in the record.

Q. On August 31, do you find any record anywhere that you

visited Miljo or General Electric or Great Falls Bleachery?

A. August what?

Q. August 31, sir?

A. 1953?

Q. Yes, sir?

A. I have nothing here on General Electric.

Q. All right. Let's take a look at your deposition, Mr. Johnson, page 75, 503, August 31, did you tell us on your deposition that you called on Miljo, General Electric and Great Falls?

(Deposition shown to the witness by Mr. Brown.)

A. That is correct.

Q. And did you do so?

A. Yes, sir, I did.

Q. And with respect to Great Falls on that occasion, what did you do at Great Falls?

A. I checked on Nuodex 100 WD.

Q. You got a report that they had been using it, they had run six hundred and forty pounds and was satisfactory?

A. They ran six hundred forty pounds that they had on hand, and that was very satisfactory.

Q. You couldn't get any more orders out of them at that time, could you?

A. They had no more orders where they needed it at this time, that is correct.

Q. Now the other two accounts on that occasion, Miljo and General Electric, do you recall that you discussed any Nuodex products or left any Nuodex literature?

A. I never discussed Nuodex products in General Electric in Somersworth.

Q. What about Miljo, do you have any recollection at to what happened at Miljo that day?

A. No, I don't.

Q. But Miljo was a potential Nuodex account, you thought, put it that way?

A. It was very possible I would try to develop them, or sell them some Nuodex material.

Q. Yes. The next one that I have is September 22, the Nashua

Corporation. Now did you go down there that day?

A. Yes, I did.

Q. And you got a notation about Nuodex 84 again?

A. Yes. I say that they order Alcoa 552, Nuodex 84 and Crumbhaar 17, 17 as needed.

Q. Now the next one on the same date, Milford Paint?

A. September 22?

Q. Yes, sir?

A. That is correct.

Q. And what do we do at Milford?

A. They order Alcoa 205, Nuodex driers and Apco thinner.

Q. You discussed a few past bills on that occasion, didn't you?

A. It says here I discussed past due bills.

Q. And we have already established through other materials here that one of the past due accounts was Nuodex's?

A. No, that isn't true.

Q. That isn't true?

A. That isn't true.

Q. All right. You did discuss Nuodex products, however, on that occasion?

A. I discussed Nuodex driers, yes.

Q. What about International Shoe on that same day; are you still without any records on what you did at International Shoe on the 22d of September?

A. That isn't it down there, is it?

Q. No, that is 1954.

A. There seems to be nothing on International Shoe in here.

Q. Let's go to your deposition, Mr. Johnson, page 74, the bottom of the page. You were asked what happened at International Shoe, and what did you tell us on your deposition?

(Deposition shown to the witness by Mr. Brown.)

A. Not on that date. You said, did I ever discuss Nuodex products.

Q. I have just turned over the page to 75.

A. No, you asked me if I discussed Nuodex products on every visit to International, and I said no, just that one time.

Q. On one time, apparently?
A. One call.
Q. You don't know which one?
A. I wouldn't know offhand. I know it was on one call. I made one call there when we started selling the Nuodex vinyl stabilizers just to see if they were using vinyl stabilizers, which they weren't, so therefore I did not mention it again. I mean—
Q. All right. What you told us in the deposition, actually you were asked what occurred during the International Shoe visit, and you said you didn't seem to have any records for 1953 on International Shoe, right?
A. That is correct.
Q. You still haven't found any records indicating what you did in 1953 at that account?
A. That's right. Some way the reports must have been lost or misplaced or something in the office.
Q. But you did call on International Shoe on several occasions during 1953, apparently?
A. I think you have so listed.
Q. Yes. But you certainly were going in there trying to sell something, weren't you?
A. Petroleum solvents, yes.
Q. November 10, did you visit Milford Paint?
A. November 10, I visited Milford Paint.
Q. Discussed the Nuodex driers again?
A. That is correct. I said they will order some before long.
Q. Yes.
A. That's right.
Q. Now on that same trip, did you call on International Shoe and Nashua Corporation?
A. November 10?
Q. Yes, sir?
A. That's right, yes.
Q. Nashua Corporation?
A. November 10, 1953, I called on Nashua Corporation. There is no mention of Nuodex material.

Q. And you don't actually know whether you discussed Nuodex material or not, do you?

A. According to the report, I didn't.

Q. Well, when it says that you did, when it mentions that, you don't know whether you discussed it or not at Nashua, right?

A. You mean I say that, order as needed?

Q. That's right.

A. That's right, if I say order as needed, that doesn't necessarily mean I discussed it.

Q. On the same occasion, November 10, did you also call on International Shoe?

A. In my deposition, I say I did.

Q. If you said so in your deposition, did you?

A. Then I did, that is correct.

Q. And we don't have any call reports on International for that year?

A. No, but I can say that I only discussed Nuodex materials the one time, one call there, whatever call that was.

Q. Now on November 30, did you call Milford Paint about a bill, did you make a phone call to them about a bill?

* * * * * *

A. November 30, 1953, I wrote a memo to our Mr. W. H. Hawkins in D. H. Litter, New York office, concerning Milford Paint Works. Do you want me to read this?

Q. Well, you are talking about a bum check, aren't you?

A. That's right.

Q. That bounced?

A. I say discussed attached check, which I must have had attached to this memo, to the original of this memo; discussed attached check with Mr. Fred Fletcher, the subject company. He advised that we should send the check—this check—with a letter telling them that we are sending same for collection at Skowhegan National Bank, Milford, New Hampshire, and we will then receive payment direct from the bank, that is right.

Q. All right, now, the check you are referring to was a check

that they had sent to Nuodex Products, right?

A. No, that isn't true.

Q. In your deposition, page 71, your answer to Interrogatory 465, what kind of a check do you refer to; what was your answer?

(Deposition shown to the witness by Mr. Brown.)

A. I said send a check to Nuodex Products.

Q. Then you double checked yourself, didn't you, and said yes, that's right, and apparently it bounced?

A. Then I said, that's right, sent a check to Nuodex, and apparently it bounced. I was looking at this, this same correspondence. And then I think as we go along further, explanation was made.

Q. The top of page 72, in reply to Interrogatory 467, you then said?

A. I am just trying to make sure it was a check made out to Nuodex. I am not sure. Let's see. No, this was a check made out to D. H. Litter Company, I am pretty sure, and think it was for some aluminum. That's right, it was a D. H. Litter check.

Q. Now are you satisfied now as to which way that transaction was?

A. Yes.

Q. And do you say that you were not on that occasion pushing Fletcher about a check for Nuodex?

A. No, that is correct. I believe some material went into evidence.

Q. Yesterday?

A. Yesterday, in connection with this same thing, and it was definitely a Mr. Hawkins that was after us, that is D. H. Litter Company in Allston, to collect money from Milford Paint owed to D. H. Litter Company for Alcoa Aluminum.

Q. And Nuodex was also after you to collect for them, weren't they, at the same time?

A. No, no, Nuodex wrote directly to Milford Paint. We saw a copy of the letter. And of course when we saw a copy of the letter from Nuodex to Milford Paint, naturally we were

going to go after money owed to D. H. Litter Company before Nuodex got theirs.

Q. In any event, the papers with respect to that credit transaction, and the evidence about it, went in the other day?

A. Yes. I would mention that Alcoa Aluminum is billed by the D. H. Litter Company as distributor, and therefore it is our own money which we need for operating capital.

Q. December 16, Nashua Corporation, did you visit them?

A. What is the date, sir?

Q. December 16?

A. December 16, yes, I did.

Q. Yes?

A. December 16, 1953, I called on Nashua Corporation, and no mention is made of any Nuodex material.

Q. All right. Now the same date, did you go down to Milford Shoe?

A. Milford Paint, you mean?

Q. I mean Milford Paint?

A. That is correct.

Q. And did you discuss at Milford Paint the Nuodex driers?

A. I would say so. I say they have enough materials on hand. Therefore, I must have checked their need for Nuodex driers.

Q. Now the next item, getting up to 1954, July 13, Milford Paint?

A. That is correct.

Q. Discussing the driers again, are you?

A. That is correct.

Q. And did you on the same date go over to Putnam?

A. July 13, 1954, is that it?

Q. Yes, sir?

A. July 13, 1954, I called on F. A. Putnam and discussed Nuodex materials.

Q. Nuodex driers and Nuosperse?

A. That is correct.

Q. And did you go to Miljo Chemical on the same day?

A. That is correct.

Q. Do you have a report on what you did down there?
A. Yes, I do.
Q. No mention of any Nuodex stuff in it?
A. There is no mention of any Nuodex materials, that is correct.
Q. All right. September 22, Milford Paint?
A. That is correct.
Q. And did you get after them again on some Super-Adit?
A. Yes. May use Super-Adit next spring.
Q. What else did you talk about there?
A. Driers. I checked their need for Nuodex driers.
Q. What is this notation in here about New England Chemical Supply?
A. I say that he gets his mineral spirits from New England Chemical Supply.
Q. That is another place that you sometimes call on, is it, or is that a competing source?
A. New England Chemical Supply I call on.
Q. Merrimack, New Hampshire?
A. Yes, that is correct.
Q. As a matter of fact, did you visit New England Chemical that day?
A. What date was that again?
Q. The 22d of September?
A. Yes, I did.
Q. But you didn't talk with them about any Nuodex items?
A. No, I just discussed Anderson and Pritchard items, petroleum solvents.
Q. How about October 5, Mr. Johnson, did you get up to Great Falls Bleachery on that date?

* * * * * *

Q. Let's do it the other way, by deposition, October 5, 1954, Putnam, New Hampshire, General Electric in Somersworth Putnam, New Hampshire, General Electric in Somersworth—

Mr. Ransmeier: Where are you reading?

(Questions by Mr. Brown)

Q. Great Falls Bleachery and Miljo Chemical, top of page 63, Interrogatory 392?
(Deposition shown to the witness by Mr. Brown.)
A. Yes.
Q. Now G. E. was the same as previously, you didn't discuss Nuodex at G. E.?
A. That's right, I didn't.
Q. At Great Falls, you saw the purchasing agent and found out what his situation was on Nuodex 100?
A. That's right.
Q. And he told you that they were ordering Nuodex 100 as needed and it was working out all right?
A. That's right.
Q. And that is the time that he said he wasn't getting very good delivery by the truck route that was being used?
A. Of course I knew he was ordering it as needed anyway. We get a copy of the invoice. But he told me that, of course.
Q. He also told you he was having difficulty with the trucker and wrote a letter and got that straightened out with him, right?
A. That is correct.
Q. Now at Miljo on that occasion, you not only talked Nuodex, but left him a sample of Nuosperse, didn't you?
A. That's right.
Q. Then on November 1, 1954, Mr. Johnson, were you down at the Nashua Corporation about nuostaves?
A. November 1, 1954, I called on the Nashua Corporation and discussed nuostaves.
Q. You didn't get very far with them, did you?
A. They didn't have any interest, and did not use vinyl stabilizers, that is correct.
Q. But you tried?
A. I tried. I had to find out whether they used it.
Q. On the same day, November 1, 1954, did you also call on New England Cable here in Concord about nuostaves and vinyl stabilizers?
A. November 1, 1954, I called on New England Cable, Concord,

New Hampshire, and checked to see whether they were doing anything in the field of vinyl compounds. And since they don't do anything in that field

Q. Looks as if they might, possibly?

A. He said they might sometimes go into the use of vinyls, and therefore I left some literature with them on the nuostaves.

Q. And that is, again, the Nuodex product that you are promoting at that point, right?

A. That's right.

Q. Now on the same date, did you call on International Shoe, and I show you your call report which is included in Plaintiff's Exhibit No. 15, and this time at International Shoe were you discussing Nuodex?

(Document shown to the witness by Mr. Brown.)

A. That's right, I talked with them there and discussed and gave them literature on the nuostaves. I was advised that they have done some experimental work with vinyls and therefore might be interested sometime in the future.

Q. Now at some point in the game, somebody stapled that call report of yours about four times, I guess, to Mr. Houston's direct letter to International Shoe in Manchester, which indicated that back in April of 1954 Mr. Houston directly sent them a lot of information on Nuosperse, right?

A. April 1, he sent data on Nuosperse, that's right.

Q. That is Nuosperse 657?

A. That is correct.

Q. And that is a different Nuodex product from the one you were promoting on to them the first of November. You are talking about nuostaves, and he is talking about Nuosperse?

A. That's right. I may have at some previous time mentioned Nuosperse to them. I don't know.

* * * * * *

Q. Just before the recess, Mr. Johnson, you determined that you had no call report in what you had before you for December 30, 1954, at Great Falls Bleachery, is that right?

A. That is correct.

Q. I show you in Plaintiff's Exhibit No. 23 a piece of paper and ask you again, did you call at Great Falls Bleachery on December 30, 1954?

(Document handed to the witness by Mr. Brown.)

A. I called them on the telephone.

Q. All right. What did you do on that particular occasion?

A. I checked with Mr. Colburn at Great Falls Bleachery concerning a procurement, Government procurement, on target cloth, and the particular specification called for chemical material.

Q. Let's shorten this up. Were you calling with respect to Nuophene, a Nuodex product?

A. I called in respect to Nuophene, a Nuodex product, which could be used on this specification.

Q. Let's get on to the next one. You suggested sending a sample of that stuff up there to him, did you?

A. That's right. I talked to Mr. Collins, the chemist, and was going to send him a sample of Nuophene. I didn't talk to Mr. Collins. I talked to Mr. Colburn, and he suggested that I send a sample to Nuophene to Mr. Collins, the technical director.

Q. Will you go to January 4, 1955, and see whether you were up at Great Falls Bleachery on that date?

A. I don't have that 1955 correspondence folder here.

Q. Well, let's see if we can find that.
Incidentally, all these records we are using are Litter Company records instead of Nuodex, is that right?

A. That is correct, these are from D. H. Litter Company files.

Q. All right, January 4?

A. Yes.

Q. Now would you say whether you visited Great Falls about Nuophene and Nuodex 100?

A. That is correct.

Q. All right. On the same date, did you visit General Electric at Somersworth and Miljo Chemical?

A. That is correct.

Q. And at G. E., of course, you didn't talk about any Nuodex product?

A. No, sir, I didn't.

Q. Have you got your call report on Miljo?

A. Yes, I do.

Q. And at Miljo, you discussed Nuosperse?

A. No, I didn't. I didn't discuss any Nuodex material on January 4, 1955, according to my report.

Q. Well, in your deposition, page 55, your answer to question 340, you did indicate that on some occasions, at least, you may have mentioned Nuodex products to Miljo?

(Deposition shown to the witness by Mr. Brown.)

A. I think I have testified before that I had mentioned Nuodex products to Miljo on some occasions.

Q. And with respect to this particular visit?

A. With respect to this particular visit?

Q. Your answer to question 343 on page 56, what did you tell us at the deposition; that you probably checked with them to see whether they wouldn't be using—

A. No, right here. You say, what occurred at Miljo Chemical I said, January 4? You said, yes. I discussed Alcoa Aluminum and Anderson-Pritchard petroleum solvent. That is all. Was there any discussion about Nuodex products? No. You asked me, has Miljo Chemical ever purchased any Nuodex products?

Q. And you said no, according to what you had there?

A. According to what I had in the file, they hadn't.

Q. Now, still continuing on page 56?

A. Then you mentioned that we had Miljo listed on a paper that we had entitled Nuodex sales in New Hampshire.

Q. Yes?

A. And you said, has Miljo Chemical on some occasion previous to 1953 purchased Nuodex products?

The Court: That is all established, isn't it?

The Witness: Yes. That is all.

(Questions by Mr. Brown)

Q. Go ahead, and you said the reason.

A. The reason they are on the list, I may have mentioned Nuodex products to them.

Q. Now the next reference?

A. What is your recollection with reference to that?

Q. You said to mention Nuodex products?

A. Yes. You said yes. I think I possibly mentioned Nuosperse, which is a wetting agent.

Q. The next question was, did you mention this particular Nuodex product in an endeavor to make a sale?

A. And Mr. Sulloway said, you mean on this occasion? Mr. Sanders said, I don't know yet when he made it.

Q. And your answer was?

A. I said, I probably just checked with him to see if there was interest in Nuodex products.

Q. And if that is what you said on your deposition, is it probably true or not?

A. I don't know if I said that in relation to January 4. According to my call report, I didn't mention it.

Q. Mr. Sulloway wanted to be sure it was understood that you would talk about that occasion. After he made that comment, you said, I probably checked with them to see if there probably was interest in Nuodex products, is that right?

A. That is correct. I don't think I was referring to it, but, I mean, it makes no difference. I would just as soon as—if that is what I said, that must have been what I thought at the time. I probably misinterpreted the thing.

Q. Where is your Miljo call report; does it say anything at all on that?

A. For January 4th?

Q. Yes?

A. No, it doesn't mention any Nuodex products on here.

Q. There is no reference to any Nuodex products on there at all?

A. No, there isn't.

Q. Nuosperse, or anything else?

A. No.

Q. All right. Now would you check January 12; did you go

down to Nashua Corporation on January 12?

A. That is correct.

Q. About Nuodex 84, amongst other things?

A. I don't see any mention of any Nuodex products on here. However, I mean, it is possible whenever I call on them I know from time to time I would say to them, is everything satisfactory on Nuodex material?

Q. You probably do that on each trip?

A. Yes. I probably don't even put it on the report. I don't write the report until a day or two after I make the call.

Q. Will you check that Milford Paint on that date, January 12, and see if you were talking to them about Nuolate driers?

A. I discussed Nuolate driers, January 12, 1955.

Q. All right. How about New England Chemical Supply, did you visit them on that date, January 12?

A. Yes, I did.

Q. Of course you weren't talking any Nuodex down there?

A. No. Mr. Oranker was out.

Q. You didn't talk about anything, then?

A. I didn't talk about anything.

Q. How about Hampshire Manufacturing

A. I wouldn't have been mentioning anything about Nuodex.

Q. How about Hampshire Manufacturing on January 12?

A. I checked with them to see if they were using vinyl resins for slush molding, and I discussed nuostaves, a Nuodex product.

Q. All right. March 17, Mr. Johnson, would you check Simplex Wire and Cable and see if you visited them with respect to a Nuodex wetting agent?

A. March 17, I called on Simplex Wire and I discussed Nuodex material.

Q. All right. Do you have a notation whether it was a wetting agent, or do you recall that that was the item that they were possibly going to be interested in?

A. Nuodex Compound, X 209.

Q. Is it a wetting agent?

A. It is a wetting agent, yes.

Q. All right. Did you visit Great Falls Bleachery on that date with respect to Nuodex 100?

A. March 17, 1955, I called on Great Falls Bleachery and discussed Nuodex 100 WD.

Q. As a matter of fact, that was the only thing that, according to your report, that Nuodex item was the only thing you were discussing up there on that particualr trip, isn't that so?

A. At Great Falls, yes. On previous occasions I asked them if they used any solvent or anything like that, and of course they didn't use any.

Q. On that same date, did you visit General Electric?

* * * * * *

The Witness: Yes, I did.

(Questions by Mr. Brown)

Q. And again you wouldn't be discussing any Nuodex products?

A. No, Nuodex products were not discussed. I discussed aluminum.

Q. Now it is of course entirely possible, Mr. Johnson, that you made additional visits on which the call reports are missing in the same fashion on that some of them are on those that that you know about, that is so, isn't it?

A. I believe, as far as I know, any calls that I made are listed in my deposition, because I had a list made of the calls. That is why I was able to give you such a complete list of calls in my deposition.

Q. But you did miss a couple, even so, in your deposition that we found in other records, do you recall?

A. I don't recall.

Q. You still haven't located your call reports covering International Shoe, at least?

A. Of course that doesn't mean I didn't write a report. It may have been misfiled or lost, one way or another, over the last five years.

Q. And you previously told us that when you made a call on any of these accounts, of course the accounts you called on were always potential customers for the products of any of your

principals so long as you kept them active, isn't that so; you viewed them in that fashion?

A. No, some of the accounts I called on, I know they are not potential for some of our principals. It depends on what business they are in.

Q. Generally speaking, if you had an opportunity to introduce the product of Nuodex, for example, in one of these other accounts that were active accounts to you, you were alert to the opportunity?

A. Well, of course.

Mr. Brown: I think that covers the items that Mr. Sulloway was unsure about, Your Honor, with respect to Exhibit No. 3. And I would like to renew my motion at this time that the marking for identification be stricken from Exhibit No. 3 and it be received as an exhibit, summary exhibit, covering the facts.

Mr. Sulloway: I still say the reference on the margin is inaccurate. It appears that from this testimony—

The Court: It is obvious that some of these items here were not supported by this testimony. I will receive this document as a chalk as made to the Court.

Mr. Sulloway: That is satisfactory.

The Court: And it may be received as evidence insofar as it is supported by the record, and with that limitation.

Mr. Sulloway: That is all right with me.

Mr. Brown: Thank you.

I have no further questions.

Mr. Sanders: I have just a few.

Further Recross Examination

(Questions by Mr. Sanders)

* * * * *

XQ. Now in the fall of 1953, did Milford Paint owe Litter Company a bill?

A. I believe that was the one that we just discussed.

XQ. Can't you answer me directly? I don't want to go on and on and on.

In the fall of 1953, did Milford Paint owe Litter Company a bill?

A. I don't recall without —

* * * * *

XQ. All right. Now in the fall of 1953 — now maybe you can answer me — did Milford Paint owe Litter a bill?

A. That is correct.

XQ. And was that for Alcoa Aluminum?

A. That is correct.

XQ. And did Mr. Johnson at sometime in either August or September send in to Litter Company a check in payment of that Alcoa bill, which bounced?

A. You mean Fletcher?

Q. Fletcher, yes?

A. Yes.

XQ. Is that right?

A. That's right, in the fall of 1953 he sent a check in which it bounced, that is correct.

XQ. All right. Now I want you to refer to the copy of the letter from Nuodex Products to Milford Paint Works under date of August 31, 1953?

A. Yes.

XQ. Have you read that through now to yourself?

A. Yes.

XQ. All right. Now you made a call on Milford Paint on September 22, 1953, did you?

A. That is correct.

XQ. And at the time you made this call on Milford Paint in September, on September 22, 1953 —

A. Yes.

XQ. — you were aware that Milford Paint owed Litter a bill, and also that it owed Nuodex a bill, were you not?

A. I was familiar with the fact.

XQ. All right.

A. I mean this letter of August 31, naturally I had a copy of it. I was familiar with the fact.

XQ. Then the answer is yes?

A. Of course as of September 22, I didn't know whether they did. They might have paid it between August 31 and September 22, I don't know. If they sent a check to Nuodex between August 31 and September 22, I wouldn't know about it.

XQ. So as far as you were informed, when you called on Milford Paint on September 22, 1953, did you believe that Milford Paint owed both a bill to Nuodex and a bill to Litter Company?

A. I knew about it, definitely, that they owed money to D. H. Litter Company. I didn't know at the time whether they owed money to Nuodex.

XQ. You are just quibbling with me. On August 31, 1953, from a copy of a letter under that date received by Litter Company, September 8, 1953, you were informed that Milford was indebted to Nuodex, right?

A. I was aware at that time that they were indebted to Nuodex.

XQ. Did you have any information to the contrary concerning their indebtedness of Milford to Nuodex between September 8, 1953, and your call on September 22?

A No, but I wouldn't know when I made the call on September 22 whether they still owed the money or not, because they might have sent a check to Nuodex between September 8 and September 22. And if they did, I would have no record of it, because Nuodex does not advise us of any checks they get from customers.

XQ. All I asked you was for your information, not for possibilities.

A. I wouldn't know.

XQ. On your call report of 9-22-53, on Milford Paint Works, did your entry in the first sentence read as follows: discussed past due bills, b-i-l-l-s?

A. Yes, it does.

XQ. Now let's see if we can assemble this. Now Mr. Brown and you had a little difficulty concerning an August 16 visit—

Mr. Sanders: On Mr. Brown's schedule, Judge, the exhibit which you have just admitted, an August 16, 1951, entry of a call to Milford Paint.

Mr. Brown: And to Miljo.

Mr. Sanders: And to Miljo.

(Questions by Mr. Sanders)

XQ. Now showing you from the Litter correspondence file of 1952, does there appear a call by you on Miljo Chemical Company of Epping, New Hampshire, under date of August 16, 1950?

(Document shown to the witness by Mr. Sanders.)

A. That is correct.

XQ. So this happened to be misplaced?

A. Pardon?

XQ. This?

A. That is in the 1952 folder, I see.

XQ. And Litter Company sells driers only for Nuodex, right?

A. We sell other materials for Nuodex.

XQ. Sir, does Nuodex sell driers—does Litter Company sell driers put out by any other concern other than Nuodex?

A. No.

XQ. On August 16, 1950, on a visit to Miljo Chemical Company, you discussed driers, didn't you?

A. That's right. I said they use no driers.

XQ. And you of course were discussing Nuodex driers?

A. That's right.

XQ. Now—all right.

Mr Sanders: That is all.

(Questions by Mr. Sulloway)

XQ. Just one or two questions.

Mr. Johnson, did you ever understand that you were a bill collector for the Nuodex Company?

A. No.

XQ. And is it a fact after you went all through these call reports and so forth which you have gone through, that in a good many cases, in addition to what you said about referring to Nuodex products, you also on the same call

did refer to the other principals that you work for, like Alcoa and Anderson-Pritchard, who had products of that nature?

A. Yes, of course.

Mr. Sulloway: That is all.

* * * * * *

Howard C. Cookingham

having been previously sworn as a witness for the plaintiff, resumed the stand and further testified as follows:

Continued Direct Examination

(Questions by Mr. Brown)

* * * * * *

Q. When your organization, Mr. Cookingham, delivers any Nuodex material into the State of New Hampshire, you have on it a notation that it comes through the D. H. Litter Company, is that right?

A. Do you mean on the material itself, or on the paper work involved with it?

Q. Well, for example, can you tell me by looking at these papers I put in your hand, if they came into New Hampshire, whether they came through your organization?

A. This first paper is a price list on Exkin which came through our Allston office, which is designated because it has our stamp on it, and that is put on in our office.

Q. What I would like to know, Mr. Cookingham, is whether or not on Nuodex material that your organization does distribute, whether that stamp does appear?

A. No, it does not, necessarily.

Q. Sometimes it may, and sometimes it may not?

A. That is correct.

The Court: What stamp is that?

(Papers handed to the Court by Mr. Brown.)

The Witness: On the corner of the letters are address and telephone number.

The Court: Oh, I see. All right.

(Questions by Mr. Brown)

Q. Could you tell us, Mr. Cookingham, whether the amount of Nuodex material which is distributed in New Hampshire either by your organization or directly from Nuodex would be an amount of material as great as what I have in my hand?

A. I would have no way of knowing. I assume you have in your hand the literature published by Nuodex, is that correct?

Q. Well, you look through it and advise the Court, if you can after looking through it, whether that material represents what probably did come into New Hampshire to accounts in New Hampshire as a part of Nuodex-Litter sales effort?

A. All this material that I have here is available for distribution in New Hampshire; whether or not any of it was distributed in New Hampshire, I would have no way of knowing.

Q. Who would?

A. To my knowledge, no one in our organization.

Q. In the Litter organization?

A. That's right.

* * * * * *

The Court: What do you mean by available, put it that way? What do you mean by that?

The Witness: Well, this is primarily, this material I have here, is primarily technical data sheets on different products manufactured by Nuodex, printed by them, and furnished to us for distribution. Now whether or not we distributed any of these in New Hampshire, or our salesman Mr. Johnson distributed any of these in New Hampshire, I have no way of knowing.

The Court: Do you have any way of knowing whether any of it is distributed?

The Witness: I have no way of knowing.

The Court: Go ahead.

(Questions by Mr. Brown)

Q. We have previously asked you in your deposition, did we not, Mr. Cookingham, whether a group of the materials which were mailed in New Hampshire on the mailing list could be assembled, do you recall that?

A. I don't recall that exact request. I recall there was a discussion of a mailing list and the literature that we had available for distribution. We furnished that, as far as the material available for distribution. It was also decided that our mailing list would have no bearing on any direct mailings into New Hampshire, because we make no direct mailings into New Hampshire, that is, D. H. Litter Company. And because of that fact, Nuodex was asked to furnish their mailing list for New Hampshire, which I believe they did.

Q. Let me ask you, Mr. Cookingham, whether you have put together the items that came into New Hampshire?

A. I can't say whether they came into New Hampshire. It may or may not have been actually sent out by the company. Perhaps Mr. Reiter can tell you more about it. I don't know exactly what went out. This material in hand that is used in connection with sales.

Mr. Brown: Do I understand from your response that you do not have available a group of materials which were sent into New Hampshire on this mailing list?

Mr. Sulloway: I don't think I know what was sent into New Hampshire. We did furnish some sort of material that was available, and somebody can testify as to whether it was sent into New Hampshire.

Mr. Brown: May I have a moment, Your Honor?

(Mr. Brown conferring with Mr. Sulloway.)

Mr. Sulloway: Mr. Brown says that he would have a witness who would testify that the Milford Paint Company received all that material. He needn't bring any such witness here. If he said he received it, I will agree that he did receive it.

* * * * * *

Mr. Brown: We offer it.

The Court: All right, the whole file.

The Clerk: Received and marked Plaintiff's Exhibit No. 24.

(Questions by Mr. Brown)

Q. I think you previously told us, Mr. Cookingham, your concern was entitled to a commission on all sales in New

Hampshire, whether or not you actually had anything to do with the sale?

A. That is correct.

Mr. Brown: You may inquire.

Cross Examination

(Questions by Mr. Upton)

XQ. Where is your place of business located?

A. Our main office is in New York City; branch office in Allston, Massachusetts.

XQ. And your branch office has been located in Allston how long?

A. I would say approximately since 1937 or 1938.

XQ. And there has been reference to a warehouse where the products of Nuodex are stored; where is that located?

A. At the present time, Nuodex is storing their merchandise at the Mystic warehouse in Medford, Massachusetts.

XQ. And you have referred to the present time?

A. Immediately prior to the present warehouse, they were storing material in the standard storage warehouse at Brighton, Massachusetts.

XQ. Now who has charge of the stock which is carried in this warehouse?

A. The warehouse.

XQ. I beg your pardon?

A. The warehouse.

XQ. Well, you mean—

The Court: The custody of it. You mean the custody of it?

(Questions by Mr. Upton)

XQ. Yes, who has access to the warehouse?

A. The warehouse.

XQ. You mean the proprietors of the warehouse?

A. I would assume so, yes.

XQ. There is some reference here to shipments made out of the warehouse; who has charge of those?

A. The warehouse has complete charge of all shipments.

XQ. Well your answer makes it necessary for me to go into the

course of business. Tell us how orders are taken by your salesmen and are handled and filled?

A. From the warehouse.

XQ. You don't tell me the process. What is done with the order when it is received? When the order is received in your office?

A. When the order is received in our office, if the account is on open terms, which means that Nuodex has previously approved the credit, the warehouse is telephoned by our office and given the order, which they ship.

XQ. Well, is Nuodex notified in any way?

A. Nuodex is notified after the warehouse has made shipment of the material. They return to our office a copy of the shipping papers which is forwarded to Nuodex.

XQ. To Nuodex where?

A. At Elizabeth, New Jersey.

XQ. Now when the order is received, is Nuodex notified?

A. No, sir.

XQ. That is, you forward these orders to Nuodex after they are filled?

A. That is correct, after the warehouse has filled them.

XQ. Forwarded for billing?

A. That is correct.

XQ. Suppose the warehouse does not have the particular product?

A. If the material that is ordered from our office is not in the Nuodex warehouse at Medford, the order is then placed with Nuodex by mail on one of their regular order forms by our office.

XQ. And how do you know whether or not the particular product is available at the warehouse?

A. We keep a running inventory in our office of what is in the warehouse.

XQ. Well, now, who has charge, immediate charge, of the stock in the warehouse?

A. The warehouse.

XQ. I understand, but that doesn't identify it; the proprietors, whoever they may be.

A. Mr. Arthur DeMontegue.

XQ. And is he employed to take charge of the products of Nuodex which are stored at the warehouse?

A. He is the owner of the warehouse.

XQ. The owner of the warehouse. Somebody has to make the shipments?

A. I would assume his employees make the shipments. I don't know who makes the shipments.

XQ. The orders are referred to him?

A. They are referred to his office, whoever happens to answer the phone in his office.

XQ. And filled in the way you describe?

A. That is correct.

* * * * * *

XQ. What products of Nuodex does Litter Company sell?

A. To my knowledge, we sell all of the products listed on their standard price sheet.

XQ. Well, have you brought a copy of that price list here?

A. I believe there is a copy in the last exhibit that went in, if I am not mistaken.

XQ. Well, your attention is directed to Plaintiff's Exhibit No. 24; will you show us the price sheet if it is there?

(File handed to the witness by Mr. Upton.)

A. This is only a partial price list. That is only textile fungicide. There is another main price list showing other products which is not in here. I assume Mr. Fletcher received a copy of our regular price list also.

XQ. Who would send them the price list?

A. Nuodex direct from Elizabeth.

XQ. Well your attention is called to the price list of Nuodex textile fungicides which was found in Plaintiff's Exhibit No. 24; does that cover the materials used by manufacturers of paint manufactured by Nuodex?

A. This would not cover all of the products manufactured by Nuodex used by the paint industry.

XQ. What other products are manufactured by Nuodex for the paint industry?

A. Nuodex Cobalt, Manganese, Lead, Calcium, Cerium, plus a line of wetting agents, plus mildew proofing agents, plus rot proofing agents.

* * * * * *

XQ Is there any difference between your selling method in New Hampshire and other territories which you serve?

A. I would say there is no difference in the basic selling method, but actually there is a difference in the way it is implemented.

XQ. What do you mean now?

A. Concentration of effort that is put into New Hampshire say, versus Massachusetts or say some other area.

XQ. Over the last five or six years, what have you done to bring these products to the attention of manufacturers or consumers in New Hampshire?

A. We have made direct personal contact, as shown by Mr Johnson's visits already in evidence, I believe. To my knowledge, that is all that has been done by the D. H. Litter Company.

XQ. Well, you have spoken of mailing?

A. We have never made any mailing from the point of view of direct mailing advertising into New Hampshire, to my knowledge.

XQ. Have you requested mailing to be made?

A. No, sir, we have not.

XQ. You never have requested Nuodex Manufacturing Company to send any of its literature into the state?

A. We may have requested to send literature in from time to time as indicated by Mr. Johnson's call reports. We have never requested a general mailing of any sort for the State of New Hampshire.

XQ. Well, what has Nuodex done, to your knowledge, to create a market here in New Hampshire for its products?

A. I am not in a position to say what Nuodex have mailed into New Hampshire over the last five years.

XQ. Tell us what you know about it?

A. I do not remember what has been mailed.

XQ. You do know they have been mailing literature into New Hampshire to create a market for their products?

A. I assume that the literature that has been mailed in general to their mailing list on a specific item has come into New Hampshire. I do know for an actual fact, however.

XQ. Has Mr. Johnson been furnished with literature for use in soliciting orders or business?

A. Mr. Johnson has available to him all technical literature or any literature published by Nuodex. How extensively he has used it in New Hampshire, I do not know.

XQ. When you speak of technical literature, does that mean literature of the kind which we find in Plaintiff's Exhibit No. 24?

A. Some of it, yes. Some of that is direct mail advertising from Nuodex, which we do not use normally in our sales solicitation.

* * * * *

XQ. Can't you tell us in a general way the difference, if there is a difference, in the character of the literature?

A. I can separate it according to direct mail and material that might be furnished by our office.

XQ. Tell us what might be furnished by your office, that may take the less time?

* * * * *

A. I don't know how you want me to record this. This is direct mailing in my left hand. And the material in my right hand is available through distribution through Johnson's efforts.

XQ. The material in your right hand consists of book-printed matter?

A. Booklet form.

XQ. The other is largely mimeographed, letters, or the like, is that it?

A. That is correct. Incidentally, there is a price list here of their other products if you want it.

XQ. May we have that, now that you have found it? (Paper handed to Mr. Upton by the witness.) Now you produced the first price list we had, which was printed on yellow paper. Now you produced a price list on paper what color?

A. Pink.

XQ. I thought it was pink, but I wasn't quite sure.

A. I think it is faded some.

XQ. So we now have a list of all products of Nuodex Company distributed by you or sold by you for them?

A. I would say this is as close to a complete list as there is available in printed form. There may be some products that are not on this list that we distribute, however.

XQ. In your examination of Plaintiff's Exhibit No. 24, distinction was made between the mimeographed material and the printed material. Do you know whether the mimeographed material is sent out directed to the trade?

A. I believe all of the mimeographed letters in that file with attached information was mailed directly from Nuodex to a mailing list of a particular industry that that mailing may have gone to.

XQ. And the printed material, the pamphlets, circulars, and the like, may have gone out either directly to the trade from the Nuodex Company or may have been distributed through you?

A. That is correct.

XQ. Now do you know of any other measures taken by Nuodex Company in the last five or six years to create a market in New Hampshire for its products?

A. No, sir.

XQ. Are you familiar with the advertising through periodicals?

A. Yes.

XQ. Well, do you know whether Nuodex has done systematic advertising through various trade journals and periodicals?

A. Yes, they have.

XQ. And what are some of the periodicals which Nuodex has advertised which are distributed here in New Hampshire?

A. I believe that was all covered by questions put to Mr. Houston, the sales manager of Nuodex, who is in a better position to say whether they did their advertising.

XQ. I thought you could do a better job?

A. No, sir. I say he knows a lot more about it than I do.

XQ. Well, you are somewhat familiar with their advertising?

A. I see many of their advertising in the journals that cross my desk.

XQ. What journals cross your desk containing the advertising of Nuodex Company?

A. American Paint Journal, for one. I believe that is the only one that regularly they advertise in that crosses my desk.

XQ. Well, are you familiar with the National Painters' Magazine?

A. No, sir, I never saw it before.

XQ. Which is here as King Exhibit AA?

A. No, sir, I have never seen a copy of it before.

XQ. Well, your attention is directed to Exhibit AA, Page 5; have you seen that advertisement or similar advertisements before?

A. I have seen advertisements on the same general subject of two-to-one it's mildew, but I have never seen it in a magazine.

XQ. You have seen that type of advertising?

A. I have seen that type of advertising. Whether or not it is in the same form as here, I don't know.

XQ. Put out over the last five or six years by Nuodex?

A. I don't even know whether or not they have used that theme for five or six years.

XQ. How long has that type of advertising been used to your knowledge?

A. I wouldn't know.

XQ. Well, let's see, they began to put Super-Adit on the market about January 1, 1953, that is correct, I believe?

A. I believe that is correct.

XQ. Hasn't that type of advertising been run in periodicals of this character since then?

A. I would not know.

XQ. What do you know about it?

A. I know nothing about the advertising in that type of journal, because I don't receive that journal as a subscriber.

XQ. So you can't help us in the least?

A. No, sir, I cannot.

XQ. You take orders for Super-Adit in one-ounce and five-ounce bottles?

A. May I have the question repeated?

XQ. Do you take orders for Super-Adit in one-ounce and five-ounce bottles?

A. Do I, or would I?

XQ. When I address you, I am thinking of your company. I am not trying to draw a distinction between you and Litter and Company. Does Litter and Company take orders for Super-Adit in one and five-ounce bottles?

A. No, sir, not today.

XQ. Have you ever?

A. Yes.

XQ. When?

A. Up to the time Doggett and Pfeil Laboratories began bottling Super-Adit.

XQ. How do they reach the trade if you don't take orders?

A. I do not know.

XQ. Your attention is directed to Plaintiff's Exhibit No. 19, and particularly to a blue sheet entitled Nuodex Paint Fungicides Reference Manual, Page A12; have you seen that before?

(Document handed to the witness by Mr. Upton.)

A. Yes, sir.

XQ. What is it?

A. It is a policy pertaining to the Super-Adit in bottles for custom treating of paints.

XQ. And this particular statement of policy is intended to be part of a reference manual. What is the reference manual?

A. The reference manual is a reference manual for Nuodex personnel and the salesmen on Super-Adit.

XQ. Well, this was intended primarily for sale-men?

A. This was intended for sales people within the Nuodex organization and within their sales representatives.

XQ. Well, you are the Litter Company; Litter Company is a sales representative?

A. That is correct.

XQ. And these instructions were issued when, if you know?

A. Well, I don't actually know when they were issued I would assume sometime either just prior or just after May 1, 1954.

XQ. And does this Page A12 of the reference manual authorize representatives to sell Super-Adit in bottle form?

A. I would say it did not.

XQ. You say it does not?

A. That is correct.

* * * * * *

Does this Page A12 of the reference manual, which you say was issued in May, 1954, contain the following instructions to its salesmen: "It is suggested that you instruct your customers to forward all inquiries and orders direct to them. Any that come to Nuodex, however, will be turned over to Doggett and Pfeil immediately to insure prompt handling. All orders will be filled and billed at prices now in effect," and so forth. Do you find those instructions there?

A. Yes, sir, but that doesn't necessarily mean that we were instructed to sell the material.

XQ. What does it mean to you?

A. It means to me that if we had any customers, paint manufacturers, to whom we have been selling Super-Adit in

bottles, to instruct them to forward all inquiries in the future to Doggett and Pfeil Laboratories.

XQ. What we read there refers both to inquiries and orders. Wouldn't you also forward orders?

A. No, that isn't what it says. It is suggested that you instruct your customers to forward, not for us to forward.

XQ. Not for you to forward?

A. No, sir.

XQ. And did you carry out these instructions?

A. To the best of our ability, yes.

XQ. Do you know how Super-Adit in one and five-ounce bottles found its way into New Hampshire?

A. I know how it could have found its way. I don't know how it found its way.

XQ. Under the method of distribution employed by Nuodex Company, how would Super-Adit in one and five-ounce bottles find its way into New Hampshire?

A. Prior to the time Doggett and Pfeil began bottling Super-Adit, it could find its way into New Hampshire through paint manufacturers who purchased it from us and reshipped into New Hampshire, or by a paint manufacturer requesting Nuodex to ship direct to one of their distributors in New Hampshire, or possibly if an account in New Hampshire, paint wholesaler or distributor, wrote direct to Nuodex for small quantities, they might have been shipped direct. Since Doggett and Pfeil began bottling Super-Adit, I would believe the only way it could come into New Hampshire would be either direct shipments from Doggett and Pfeil or one of their distributors and customers.

XQ. Do you know what distributors serve New England?

A. No, sir.

XQ. Well, now, what has been the business relations between Litter and Company and the King Company?

A. E. & F. King Company have been a customer of D. H Litter Company in Massachusetts for a number of years.

XQ. And how many years, would you say?

Mr. Sulloway: Well, Your Honor, I don't know. I don't want to take any great amount of time, but what they did with the King Company in Massachusetts, I object on the grounds it is not material.

The Court: What is the materiality, Mr. Upton, on that?

Mr. Upton: Well, if Your Honor please, I want to go briefly into the relation between Nuodex and King Company as developed by Litter Company. I want to show that the dealings were such that the Nuodex Company had reason to anticipate that various of the products manufactured by King Company containing ingredients furnished or purchased from Nuodex would find their way into New Hampshire. This suit here rises out of the sale by King Company of paint to the Elliott Company, the plaintiff, and it is said that that paint contained Super-Adit. I want to show that the Litter Company had notice that the paint containing Super-Adit might be sold by the King Company in New Hampshire. Specifically, that is what my inquiry is directed to. I think that can be developed very briefly.

The Court: I think it could. I question how it is material as to whether or not the defendant Nuodex was doing business in New Hampshire. Your theory is sound, but whether or not it would establish the essential question, or contribute to the essential question of whether or not they are doing business here seems to me to be dubious.

Mr. Upton: One of these inquiries in this class of case is whether the course of business, whether the particular litigation arose from the business by the defendant. We think on that aspect, this evidence is material. If the defendant Nuodex Company sold to King Company Super-Adit to be used in paint to be distributed in northern New England, included New Hampshire, it is reasonable they should answer to a suit here.

The Court: I think I will reject it, subject to exception.

* * * * * *

Mr. Brown: May our objection to Your Honor's ruling be noted?

Mr. Upton: Also our exception.

The Court: Noted.

(Questions by Mr. Upton)

XQ. Now Super-Adit is used in paint for what purpose?

A. Super-Adit is used in paint to prevent the growth of mildew on the paint when it is applied.

XQ. And under what conditions does mildew develop?

A. Mildew develops under conditions of moisture and humidity that is proper for the growth of mildew.

XQ. And mildew is one of the problems in greenhouses?

Mr Sulloway: One moment. I don't see that this is material on the question of jurisdiction. We aren't trying this case on the merits now.

The Court: How is it material, Mr. Upton?

Mr. Upton: The same way as suggested. We think that the fact Nuodex was selling Super-Adit to the King Company to be used in the paint manufactured by it, which might well find its way into greenhouses, is one of the factors to be considered here in determining jurisdiction.

The Court: I think I will reject your offer.

Mr. Upton: Exception.

The Court: Noted.

Mr. Brown: Our exception.

The Court: Noted. On the grounds that it is immaterial, that will be the basis of my ruling.

* * * * * *

(Questions by Mr Upton)

XQ. We were discussing a few minutes ago the method taken by Nuodex Company to develop a market for its products. I think you said you were familiar with the American Paint Journal?

A. That is correct.

XQ And is this a comparatively recent copy of the American Paint Journal?

(Magazine handed to the witness by Mr. Upton.)

A. July 18, 1955.
XQ. And is this the journal which you say passes over your desk?
A. Yes, sir, that's right.
XQ. Do you know whether this journal is distributed among the trade here in northern New England?
A. I do not know.
XQ. How does it reach you?
A. I am a subscriber to the magazine.
XQ. And you are not familiar with the territory in which it is distributed?
A. No, sir.
XQ. How long have you been in this trade?
A. Twenty years.
XQ. And you haven't given any thought to the methods taken for developing the market for Nuodex Products here in New Hampshire?
A. My effort is in the field only. As far as the development of any markets or any advertising or promotional work, that is either handled by Nuodex or someone in our New York office.
XQ. Well, you are familiar, presumably, with Nuodex Cobalt 254, a product of Nuodex Company?
A. Yes, that is a product of Nuodex.
XQ. How long have you been selling Cobalt 254 for the Nuodex Comany?
A. We have sold no Nuodex Cobalt 254 for Nuodex Company.
XQ. You haven't?
A. No, sir.
XQ. When did that go on the market?
A. I would say about either May or June of this year.
XQ. Was there some similar product which preceded it?
A. No, sir.

* * * * * *

XQ. Your attention is now directed to Plaintiff's Exhibit No. 21, which appears to be a prospectus descriptive circular

put out by Nuodex Products Company, Inc., relating to paint mildew and its control. Are you familiar with that particular piece of literature?

A. Yes, sir.

XQ. And that is used by the Nuodex Company to promote the sale of Super-Adit?

A. Yes, sir.

XQ. What have you had—

A. Among other products.

XQ. What have you had to do with the distribution of this circular?

Mr. Sulloway: You mean in New Hampshire? I object.

Mr. Upton: I am interested in New Hampshire.

(Questions by Mr. Upton)

XQ. My question was, what have you had to do with the distribution of this circular?

Mr. Sulloway: I object to the question.

The Court: Generally?

Mr. Upton: Yes, a general question.

The Witness: This particular pamphlet is available to our company and any of its employees for distribution. I have distributed this manual to any number of paint manufacturers.

(Questions by Mr. Upton)

XQ. You have distributed this manual to paint manufacturers?

A. Paint manufacturers.

XQ. Regardless of where they are located in your territory?

A. I have distributed to any paint manufacturers on which I have called.

XQ. Have you called on any in New Hampshire?

A. No, sir.

XQ. Other salesmen have covered the territory here?

A. Mr. Johnson, I believe has testified to the extent of coverage of our company in New Hampshire.

* * * * * *

(Questions by Mr. Sulloway)

XQ. Mr. Cookingham, since along in May, 1954, when the

arrangement was made with Doggett and Pfeil, no orders have been taken, or no solicitation was made, for the sale of Super-Adit in small bottles by Litter Company, is that right?

A. No solicitation has been made on Super-Adit. It is possible that some of our old customers that had been buying through us prior to this deal may have mailed some orders to our office, which we just put in an envelope and mail to Doggett and Pfeil immediately after the policy went into effect.

XQ. Now, Mr. Cookingham, when Mr. Johnson was on the stand and referred to the various files, and in a good many cases he read from or talked about certain salesman's reports?

A. That is correct.

XQ. Now what is the practice in regard to salesman's reports, applying it to Mr. Johnson, who was soliciting orders in New Hampshire?

A. The policy of salesman's reports within the D. H. Litter Company, Mr. Johnson for example who called in New Hampshire, would write a detail report of each one of his contacts to a customer or a prospect. That was made in duplicate, original and a copy. The original was mailed to our New York office by Mr. Johnson. The duplicate was put on to my desk. The copies of the call reports produced last week and this week at this hearing were the copies of the call reports that went to New York that came to my desk and eventually were filed in our correspondence and call report files in Allston.

XQ. So that those call reports merely relate to what went on between your salesman and the Litter Company and never went to Nuodex Company?

A. The call reports as written in duplicate never were mailed to Nuodex Products Company. Under certain circumstances, which were shown in the files, if at sometime I would have portions of the call report retyped in our office at Allston on a Nuodex call report, and that was

forwarded to Nuodex. But the files indicate in what instances that occurs.

XQ. Have you been through all the files which Mr. Johnson had here and from which he referred from time to time to the so-called call reports and picked out all of the call reports during the period from 1950 up to 1955, covering 1954 up to January 1, 1955?

A. I have gone through the D. H. Litter Company files which we produced for this hearing and taken from them all of the call reports of Mr. Herbert M. Johnson covering 1950 through 1954. The only ones not here are the ones that are already in evidence in other correspondence.

Mr. Sulloway: We offer these reports.

Mr. Brown: Mr. Sulloway, is it still so that certain of his call reports are still missing, International Shoe during a couple of years, and some others?

The Witness: There are three call reports missing in 1950, I believe; I don't remember who they are for.

Mr. Brown: Well, this offer is represented to be only the call reports which are in the file and doesn't close any of the gaps where he has testified there are some missing.

Mr. Sulloway: Yes. In other words, we are producing for marking as exhibits now simply the call reports that appear in the files which we produced and which have been used by the witness.

The Court: I hear no objection.

Mr. Brown: No objection.

The Clerk: Received and marked Nuodex Exhibit E.

Redirect Examination

(Questions by Mr. Brown)

Q. Mr. Cookingham, this is another invoice of another sale which your concern had nothing to do with, but it is a sale in New Hampshire by Nuodex?

(Invoice shown to the witness by Mr. Brown.)

A. Sale in New Hampshire, Dover Distributing Company, November 30, ship directly by Railway Express to Nuodex. I would assume we received a commission on this.

Q. Take a look at the distribution and see whether you got any notice that the sale had been made?

A. The distribution set up on here is for distribution of the copies. That doesn't necessarily mean we did not get a commission.

Q. You don't have any records up here to indicate whether or not you did?

A. No, sir.

Q. Are those records in your office or down in New York there?

A. You are talking about commission?

Q. Yes?

A. I have no records in my office of commissions paid to our company.

Mr. Brown: We offer this additional invoice.

Mr. Sulloway: All right.

The Clerk: Received and marked Plaintiff's Exhibit No. 25.

(Questions by Mr. Brown)

Q. Now, Mr. Cookingham—

Mr. Brown: While the Clerk is marking that invoice, may I inquire, Mr. Sulloway, whether you have discovered any additional sales in New Hampshire on which you have not previously submitted invoices?

Mr. Sulloway: We gave you all we have brought here, all we could find.

(Questions by Mr. Brown)

Q. This was for some more Adit, do you recall?

A. The invoice says it was Adit, so I assume that is what they shipped.

Q. If they didn't, the customer didn't get what the invoice says?

A. That is correct.

Q. By the way, you as an individual, Mr. Cookingham, have been working for Litter Company in New Hampshire on occasion during the year?

A. Oh, yes.

* * * * * *

Q. On several occasions you were up here on New England

Chemical, but not in respect to Nuodex Products?

A. That is correct.

Q. The only time you have been up here that you recall with respect to Nuodex was one time over in Great Falls Bleachery, right?

A. No, that is not correct. I may have been up here prior to this Great Falls thing on other matters for Nuodex. There is evidence introduced here on American Cord and Twine, where I made a call.

Q. Aside from those two?

A. Those two, to my knowledge, are the only times I have been in New Hampshire on any business pertaining to Nuodex.

Mr. Brown: I think that is all, sir.

Mr. Sulloway: That is all.

Mr. Upton: One word more, if I may.

Recross Examination

(Questions by Mr. Upton)

XQ. There has been introduced here Defendant's Exhibit C, which purports to show the sales of Nuodex Products in New Hampshire. The sales of Nuodex products have been increasing over the period covered by this schedule, apparently. This begins in 1951.

A. That is correct, up until 1955. I think they are falling off in 1955, however.

XQ. Well, have you any figures to show?

A. I haven't any with me, but we have figures.

XQ. The first four months?

A. The first five months.

XQ. Five months, to be more exact. Ends May 5, doesn't it?

A. That is correct.

XQ. So that you have figures there for the first four months?

A. That is correct. Since these figures, you'll notice Great Falls Bleachery, they have discontinued using the product. That makes quite a difference.

XQ. Well, in 1951, according to this schedule, total sales amounted to eight hundred ten dollars and sixty-two cents?

A. That is correct.

XQ. 1953, they jumped to twice that amount, seventeen hundred eighty-five dollars and thirty-five cents?

A. That is correct.

XQ. And in 1954 still another increase of nearly one hundred per cent, the total for that year being three thousand four hundred twenty-four dollars and ninety-two cents as compared with one thousand seven hundred eighty-five dollars and thirty-five cents in 1953?

A. That is correct.

XQ. So that the sales of Nuodex Products in New Hampshire through its sales representative Litter Company have been moving forward and upward?

A. Yes, sir. Not very high, however.

XQ. But you are still serving the territory?

A. Yes, sir.

XQ. Sales for 1955 for the first four months, amounted to nine hundred fifteen dollars and twenty-five cents?

A. Yes, sir.

XQ. So that Litter Company has been continuously and systematically over the period covered by this schedule selling the products of Nuodex in New Hampshire?

A. Yes.

Further Redirect Examination

(Questions by Mr. Brown)

Q. Mr. Cookingham, as a matter of fact, Great Falls is still doing business and ordered some of this stuff two days ago?

A. That is correct. The volume fell off considerably.

Q. Still doing business?

A. Yes.

Q. Resin Research doubled their business over what they did last year?

A. If they increased their business fifty times, it still would be nothing.

Q. You suggested that 1955 was dropping off. Now, as a matter of fact, Resin Research in the first four months of this year did as much business as they did the previous year, didn't they?

Mr. Sulloway: Your Honor, I haven't raised objections to transactions in 1955, but strictly—

Mr. Brown: This witness brought it in.

The Court: I don't see how it is material, what they are doing this year. He brought it in but—

The Witness: According to this record, Resin Research brought ninety-five dollars and fifty cents in 1955 to date, and bought ninety-six dollars and seventy-five cents in 1954. It is very possible we will not get another order from them.

* * * * * *

Mr. Brown: Mr. Reiter?

Bernard Reiter

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

(Questions by Mr. Brown)

Q. Would you state your full name for the record, sir?

A. Bernard Reiter.

Q. And where do you live, Mr. Reiter?

A. Westfield, New Jersey.

Q. And what is your occupation?

A. Treasurer of Nuodex Products Company.

Q. You are a Certified Public Accountant?

A. Yes, sir.

* * * * * *

Q. In preparation for coming up here, Mr. Reiter, would you advise us whether or not you checked the records of Nuodex to ascertain how much business your firm had been doing in New Hampshire over the period covered by these invoices that have been produced?

A. I secured from the order department the files which encompassed business done in New Hampshire.

Q. Are you satisfied that you have produced all of the invoices covering business by your firm in New Hampshire from 1951 up to the date in May, May 5 of this year; have you done that?

A. Over the weekend, I went back to the office and I checked and brought with me the accounts receivable ledgers covering all business done by the company in New Hampshire for 1951 through 1954. I also checked the files—I could not bring those cards up. They are necessary for the current business.

Q. Current records, so to speak?

A. Right.

Q. Let me ask you, sir, whether or not there are additional invoices in the years 1951 and 1952, 1953 and 1954 in addition to what your counsel has previously presented here as being all the invoices?

A. The summary that was prepared was and is substantially correct. There are some additions such as those that you have brought forth here.

Q. Are there any in addition to those two small ones?

A. There are several small ones, yes.

* * * * * *

Q. Let's start out with forty-five dollars and fifty cents, Milford Paint, that you did not previously show?

A. Yes, sir, that shows in 1954.

Q. On May 3, 1954?

A. On May 3, 1954.

Q. Covering Exkin No. 1?

A. I don't know what it covers, sir.

Q. Is that the original invoice on that shipment?

A. It would appear to be.

Q. And that was a c. o. d. shipment, wasn't it, sir?

A. It is marked here c. o. d.

Q. And your bill of lading, Nuodex bill of lading, is attached to it?

A. That is correct.

Q. And that is a sale that you made up here in New Hampshire, isn't it?

A. That is a delivery to Milford Paint Works in New Hampshire.

Q. C. o. d.?

A. C. o. d., that's right.

Mr. Brown: We offer the original invoice with the bill of lading attached, Your Honor.

Mr. Sulloway: All right.

The Court: What is the date of it?

Mr. Brown: May 3, 1954, Your Honor.

The Clerk: Received and marked Plaintiff's Exhibit No. 26.

(Questions by Mr. Brown)

Q. Now let's go to Nashua Coroporation in 1952, how much did you miss there, two hundred fourteen dollars or so?

A. The total sales to Nashua during 1954 aggregated eight hundred fifty-five dollars.

Q. During 1954?

A. I'm sorry, 1952.

Mr. Sulloway: What year?

The Witness: During 1952.

Questions by Mr. Brown)

Q. Were eight hundred fifty-five dollars?

A. Yes.

Q. On this exhibit that your counsel presented, it indicates two invoices in that year for a total of six hundred forty-one dollars and twenty-five cents? Is that right?

A. Yes, sir.

Q. And you find eight hundred fifty-five dollars?

A. One additional invoice.

Q. The F. A. Putnam account?

A. Any year, sir?

Q. For the entire period, was that correctly reported; have you checked it?

A. I think I checked it, sir, and I think it was correct.

Q. And Great Falls Bleachery?

A. Was correct.

Q. H. & H. Chemical?

A. That was correct.

Q. What about International Shoe, did you make any sales in New Hampshire to International Shoe at all?

A. I think there was no card here, which would indicate there was no sale.
Q. In New Hampshire?
A. In New Hampshire.
Q. Johns-Mansville checked out, did it?
A. Yes, sir. There were approximately nine dollars of sales in several of the years. I don't have it in front of me.
Q. Miljo Chemical checked out?
A. I don't think there were any sales.
Q. New England Cable?
A. No sales.
Q. Resin Research checked out?
A. I found one additional sale in Resin Research.
Q. What year?
A. 1951.
Q. What is the correct total?
A. Forty-two dollars and twenty-five cents.
Q. Forty-two—this is for Resin. What is the figure?
A. Forty-two dollars and twenty-five cents.
Q. And the Simplex Wire account?
A. Was correct.
Q. So that the accounts in 1953 and 1954 were correctly reported, apparently?
A. Apparently so, sir.
Q. And the errors are in 1951 and 1952?
A. And there was in 1954, I think.
Q. And one in 1954; one at Milford Paint in 1954?
A. Yes.
Q. Now let me ask you this, Mr. Reiter, did you in preparation for coming up here check your purchases in New Hampshire?
A. No, sir.
Q. So that you are not in a position to tell us whether or not you purchased anything in New Hampshire or not?
A. I cannot definitely say.
Q. Have you had any analysis made of how much servicing of

the New Hampshire accounts, which you have actually done, cost Nuodex?

A. The only cost that we would have would be the cost of commissions paid to D. H. Litter Company.

Q. That isn't actually so, Mr. Reiter?

* * * * * *

Q. Well, this Sears Roebuck catalog of slick multi-colored promotional literature, correspondence, technical data, price lists, all of that stuff represents cost to you, doesn't it?

A. I don't think that has been identified specifically to New Hampshire.

Q. You have not, then, analyzed what your actual cost of servicing these accounts is?

A. In those terms, no, sir.

Q. Incidentally, it was suggested by Mr. Cookingham that you might perhaps be in better shape to tell us about some of these items, these price lists you send out directly to accounts from Nuodex. Are you?

A. I could only tell; or I could only state by hearsay. I am not responsible for sending out price lists.

Q. On your price lists, however, you indicate there is a Nuodex representative in your area?

A. Yes, sir.

Q. And for this area up here, who is listed?

A. For the State of Massachusetts, D. H. Litter Company.

Q. It isn't for the State of Massachusetts. Isn't that the area?

A. It is listed here as Massachusetts, Allston, D. H. Litter Company, 60 Cambridge Street, and telephone number.

Q. When you send that into New Hampshire, where would you expect the inquiries to be gone to?

A. Perhaps Litter, and perhaps Nuodex.

Q. In this file there is also a price list on Exkin?

A. Yes.

Q. Sent up apparently by Litter Company?

A. According to that, I have no knowledge.

Q. The next thing we come to, that is actually a typed letter, isn't it?

A. Not specifically. It is one of these machine or mechanical typing, or whatever they call it.

Q. That is a letter sent by Donald Roon?

A. Not personally. But by imprint, yes.

Q. The next thing we come to is a letter of some kind signed by Walter Clark?

A. Again, by imprint, yes, sir.

Q. And we come to one signed by J. W. Van Tuin, the general sales manager of Nuodex?

A. At that time, yes, sir.

Q. And another one signed by Mr. Van Tuin?

A. Yes, sir.

Q. Incidentally, that one sends along the copy of your ad which you were going to run back in 1952, doesn't it; is that what he is sending up to be sure New Hampshire accounts see the advertising?

A. Yes, sir.

Q. Incidentally, on all of this correspondence that comes in directly from Nuodex into New Hampshire, the effort is to prompt the New Hampshire account to send back a pre-paid business reply card asking for materials, isn't it; don't you find such a card attached to each one of these letters generally?

A. Some of the letters have the inscription "please send us," and then a listing of certain products.

* * * * *

Q. All items we are talking about carry signatures of directors of Nuodex and would be a direct mailing piece?

A. I would presume it is, yes, sir.

Q. Those of Mr. Clark's signature, Van Tuin's, Mr. Houston's, those would be direct mail?

A. I would think so, yes.

Q. And they carry these return cards asking for orders?

A. Some of them seem to.

Q. Well, here is another one that does. Mr. Van Tuin, again, the general sales manager with another card?

A. This asks for a sample.

Q. We come to one signed by Mr. Houston, do we?
A. Yes, sir.
Q. Without a card?
A. No card.
Q. Then one with Mr. — sent in by Mr Clark with a card?
A. Yes, sir. This asks for reprint of a manual.
Q. Incidentally, that is one where they are asking Mr. Fletcher to further distribute some information to produce some more sales, right: "If you would like one hundred or so reprints to send to your customers, we would be glad to send them along to you"?
A. It reads essentially that, yes, sir.
Q. These service data sheets, you send those out periodically, do you not, from your laboratory?
A. I don't know how these are sent out in terms of time, whether by inquiry or whether automatically.
Q. Now one thing I asked a couple of days ago, and I don't think the witness had the answer, Do you know who the president of the board of Nuodex is?
A. At the current time?
Q. Yes.
A. Seymour Askin became the president of the board of Nuodex approximately February or March of 19—
Q. He is also the president of Heyden Company?
A. (No answer.)
Q. We have with us up here, and have had with us in this entire hearing, one of the attorneys of Heyden Chemical Mr. Pond?
A. Yes, sir, that is right.

* * * * * *

Q. Now, Mr. Reiter, what was Fungitrol Chemicals, Inc.?
A. Fungitrol Chemicals, Inc., was a wholly owned subsidiary of Nuodex.
Q. And it no longer exists as a separate corporation?
A. It no longer exists, period.
Q. The functions that it was performing are being performed now by whom?

A. By no one. There is no entity known as Fungitrol, corporate or otherwise.

Q. Fungitrol actually was dissolved in 1952 or thereabouts?

A. Yes, sir.

Q. What was the activity of Fungitrol as a subsidiary of Nuodex?

A. Fungitrol distributed certain products which Nuodex did not.

Q. A sales distributor separately incorporated, is that right?

A. Yes, broadly speaking.

Q. And you say no one is presently taking care of that distribution?

A. No, sir.

Q. Isn't Nuodex itself?

A. I said, sir, that Fungitrol, or the entity Fungitrol, in any form, does not exist.

Q. What I asked you, sir, is who is now handling the distribution activities that Fungitrol did handle until 1953?

A. Sir, the products that Fungitrol sold are being sold by Nuodex in the normal course of its activities.

Q. Those products have been added to the Nuodex items and are now sold through the various manners as other of its own products, is that right?

A. Yes, sir.

Q. Now what about Dosolac Chemical Company, Inc., what is that?

A. Dosolac Chemical Company, Inc., was formed in approximately 1950 or 1951. Nuodex has a minority interest in that company.

Q. Forty per cent interest?

A. Roughly forty; under fifty per cent.

Q. And what does it do; what does Dosolac do?

A. Dosolac is now inactive. It is the owner of a patent for a household disinfectant.

Q. A retail item?

A. Yes, it is a retail item.

Q. And what happened to that retail item, who is producing or selling it now?

A. It is sold by the Taylor-Reed Corporation in Connecticut.

Q. And is that a corporation in which Nuodex has an interest presently?

A. No, sir.

* * * * * *

Q. Do you have any other subsidiary operations, domestic to the United States that is, excluding your foreign subsidiaries?

A. Yes, we do have.

Q. What are the others?

A. Nuodex Products of California, Inc.

Q. And that is a west coast manufacturing and distributing company, is that right?

A. That is correct.

Q. Aside from that?

A. Nuodex International, Inc.

Q. Well, that handles your export trade?

A. It sells in the export field, yes.

Q. And what other domestic subsidiaries?

A. I can think of none.

Q. Now when you went over your New Hampshire sales this morning, we found that there were sales in addition to the invoices which had previously been submitted in each year except 1953, is that right?

A. I think that is right.

Q. Well, would you take a look at your ledger cards for 1953 and advise the Court whether there is another account for which you have a ledger card in 1953 in addition to any that are presently in evidence?

(Cards handed to the witness by Mr. Brown.)

A. I don't know whether we went over this card, sir.

Q. What is this card?

A. The name here is Millercraft Boats Experimental Department, 5 Winter Street, Laconia, New Hampshire.

Q. And was there a small sale to that concern?

A. There was a sale in the amount of four dollars and ninety-three cents on June 29, 1953.

Q. Now you have no way of knowing what that item was?

A. No, sir.

Q. You don't know whether that is the wood preservation which was registered here and found no sales on any of your other cards? Can you tell from the price, for example?

A. No, I cannot tell from the price.

Q. By the way, in that group of ledger cards that you have before you for 1953, is New England Cable one of the accounts?

A. No, sir.

Q. Simplex?

A. No, sir.

Q. Simplex Wire and Cable is?

A. Yes, the card reads Simplex Wire and Cable, Cambridge, Massachusetts.

Q. And the amount of business with Simplex Wire and Cable Company in Cambridge, Massachusetts, of course is much larger than the amount that actually came in New Hampshire?

A. Simplex, as I understand it, opened up a New Hampshire operation at the end of 1953. And there is shown on this card a sale, which was included in the summary previously submitted, in the amount of two hundred ninety-two dollars and forty-two cents.

Q. Your actual business with the concern is a matter of some thousands of dollars?

A. In Massachusetts, that is right.

Q. Well, as shown on that ledger card?

A. That's right.

Q. May I see the ledger cards for 1954, please?

A. Yes.

(Cards handed to Mr. Brown by the witness.)

Q. Now this card shows Great Falls Bleachery in the total amount of twenty-six hundred dollars for this year?

A. No, sir, twenty-four hundred.

* * * * * *

Q. Do you know whether any of these other accounts that you carry on your ledgers which include New Hampshire business are part of a larger account on which you do other sales outside of New Hampshire?

A. I'm sorry, I don't follow you.

Q. Well, it probably wasn't a very good question, Mr. Reiter. On that Simplex Wire and Cable account, you have an account with the company which was previously a Massachusetts account and on which now you do some New Hampshire business, right?

A. That is so.

Q. Do you know to what extent some of the other accounts here in New Hampshire may represent accounts that you have in other states with the same company?

A. Well, Johns-Manville is a national account. It is very possible that we sell to Johns-Manville in other states than New Hampshire.

Q. What about International Shoe, do you know whether you have some active accounts in other plants outside?

A. I have no knowledge. I know we do not have one in New Hampshire.

Q. What about Resin Research?

A. Resin Research we saw an invoice for, four dollars and fifty-four cents, representing a shipment to San Francisco.

Q. That is the only other one, so far as you know, the only other piece of business you do with Resin Research?

A. As far as I know.

Q. Is there any business controled relationship between Nuodex and any of the other distributors of special chemicals in this field?

A. You mean Nuodex have a financial interest?

Q. Well, let me see if I can make my question a little more clear.

In this Nuodex technical manual, which is in Plaintiff's Exhibit No. 24, there is a lot of information for the paint trade, is that what that is for?

A. I presume so.

Q. This particular one shows what is represented to be a front of Nuodex's factory?

A. Yes, sir.

Q. And it has D. H. Litter Company pasted on under Nuodex on the front page?

A. Yes, that looks like a sticker which was added.

Q. Now in this publication, you show on page 20 a certain group of related product manufacturers?

A. I wouldn't say related product manufacturers. These are manufacturers of raw materials who distribute or sell to the paint trade.

Q. Well, you list them as an index of manufacturers whose products appear in your formula number, don't you?

A. No, sir.

Q. All right.

A. The formulae that are listed here are not our formulae numbers. These are just, apparently these simply identify typical formulas that a paint manufacturer might use.

Q. So that the fact that in your publication you are listing United States Industrial Chemicals, Crumbhaar Chemicals, and various other concerns does not mean that there is any relationship between your concern and those companies?

A. There is no relationship by way of mutual control. They sell to the paint trade, and so do we.

Q. You are merely mutually supporting in your sales efforts?

A. No, we don't mutually support. The raw materials that are indicated there are obtainable from these suppliers.

Mr. Brown: Thank you. I think that is all. You may inquire, Mr. Sanders.

Cross Examination

(Questions by Mr. Upton)

XQ. We have some cards here as Defendant's Exhibit B, purported to have taken from your mailing list. Do you know who assembled the cards?

A. These were assembled at the direction of myself to the advertising manager of Nuodex.

XQ. You assembled the cards?

A. I didn't personally assemble them.

XQ. Did you cause them to be assembled?

A. Yes, I did.

XQ. What use is made of such cards; in other words, what use is made of your mailing list?

A. Well, I don't have direct control over the use of the mailing list. I would simply say the mailing list is used to direct mailings to the people who might appear therein.

XQ. Well, to direct mailings of what?

A. Again, I can't say, from first-hand knowledge. Apparently, it is used for mailings of price lists, or perhaps literature or mailings of various kinds.

XQ. Well, is your mailing list used to promote sales for greater market for your products?

A. Well, we are getting into an area in which I am not proficient. If advertising is related to sales in that connection, I would presume that is so.

XQ. Well, advertising is related to sales?

A. Yes, sir.

XQ. And you engage in national advertising for that reason?

A. Yes, sir.

XQ. And you advertise in the nationally distributed periodicals serving the trade?

A. In some of them, yes, sir.

XQ. Well, is it true that you advertise in all of them that have a national circulation?

A. I wouldn't think so, but I can't tell you from first-hand knowledge.

XQ. Could you tell us the names of some of the periodicals in which you carried advertising of Super-Adit since January 1, 1953?

A. I don't think that I can personally tell you in what media any specific advertisement or product was advertised.

XQ. Well, you do recognize that your mailing list is used to send out publicity of material concerning your products?

A. Yes, I would presume so, sir.

XQ. And you have how many different prospective customers in that list all located in New Hampshire?

A. There are nine listed here. One is indicated as having been removed.

XQ. Would that make a total of ten?

A. That includes the nine. Two cards here are going to people in one company. There are ten cards there. Nine concerns are involved.

XQ. How are these cards filed?

A. Well, you have heard Mr. Houston testify to that. He has more personal knowledge of it than I do, sir.

XQ. You can't give us any information about how these cards are kept?

A. Well, I have heard it said, sir, that they are kept in geographical order and perhaps in industry order, or at least coded so that industries can be removed.

XQ. And do you know how they are made up, how they are prepared?

A. That, I can't say.

XQ. Well, your attention is directed to Plaintiff's Exhibit No. 15, which consists in part of a copy of a letter dated April 1, 1954, from the Nuodex Products Company, Inc., to Mr. Koehrmann, Chemical Engineer, International Shoe Company, Manchester, New Hampshire. Is there some suggestion in that letter placing the name of the International Shoe Company on a mailing list?

(Letter handed to the witness by Mr. Upton.)

A. It is said here, "We have taken the liberty of adding your name to our mailing list to receive copies of future case histories."

XQ. And what are case histories?

A. As referred to here?

XQ. As referred to here?

A. I will read the previous paragraph: "We are enclosing a file folder containing technical data and a number of actual case histories showing how Nuosperse 657 helps solve specific problems."

XQ. And so that is all you can tell us about the subject matter of that letter?

A. Yes, sir.

XQ. Well, now, does the name of the International Shoe Company appear in Defendant's Exhibit B, the cards from the so-called mailing list?

A. No, it does not. I might say, of course, that cards are removed from time to time as that one is indicated as having been removed.

XQ. You mean that the card listing the H. & H. Chemical Company, that card is marked removed?

A. That's right, sir.

XQ. Well, your attention is called to Defendant's Exhibit C a list of apparently customers with whom you are doing business here in the state, total sales?

(Document handed to the witness by Mr. Upton.)

A. Some of these we have not done business with, apparently.

XQ. But they are included in the list, they are customers with whom you have done business at sometime, I assume?

A. Well, I see International Shoe here, and I have not in my knowledge seen any shipments or sales to International Shoe. Similarly, Miljo is here, and I don't think we have seen any business there. Nor in New England Cable. However, they are on this list showing blank sales.

XQ. But they are on the list of customers, really, that are prospective for purposes of showing business done in this state over the number of years?

A. I am not sure of the names he developed, sir.

XQ. They are not in your mailing list?

A. Some of them are, and some not.

XQ. There are several names in Defendant's Exhibit C which do not appear in your mailing list?

A. That is so.

XQ. As it has been turned into us?

A. That is so.

XQ. Your attention is now directed to Exhibit HH consisting of a letter and enclosures from Mr. Zabriskie, counsel for

Nuodex to the Commissioner of Agriculture, the letter dated May 20, 1953; and with it are certain enclosures. Are you familiar with those enclosures?

(Documents handed to the witness by Mr. Upton.)

A. Well, I have seen some of these enclosures.

XQ. Well, what can you identify?

A. You mean you want me to read this off?

XQ. No, no. What have you seen? You have seen some, haven't you? You have seen all of them before now?

A. Well, I don't think I have seen this "Dirty Paint, three to two it's Mildew." However, these look like labels on Super-Adit bottles.

XQ. You are referring to the yellow?

A. Yellow and red.

XQ. Enclosures?

A. Yes, that's right.

XQ. And you say--

A. And this I am not sure whether I have seen or not, sir.

XQ. Well, you say you doubt that you have seen this circular entitled "Dirty Paint, three to two it's Mildew"?

A. I don't think I have ever seen it, sir.

XQ. Well this states, among other things, that practically the entire United States is open to mildew attack. That has reference to mildew on paint?

A. I presume so, sir, yes, sir.

XQ. You know that, don't you?

A. Yes, sir.

XQ. And is it because mildew is a national threat that your advertising of Super-Adit is national in scope?

Mr. Sulloway: I object to that as not material on the question of jurisdiction.

The Court: Well, I think I will permit it, Mr. Upton.

Mr. Sulloway: Subject to exception.

The Witness: May I have the question repeated?

(The last question was read by the reporter.)

The Witness: Well frankly, sir, I don't think I am able to tell how national our advertising on Super-Adit is.

(Questions by Mr. Upton)

XQ. Well, haven't you told me already that Super-Adit is a nationally advertised product?

A. I think that that may be said, sir.

XQ. And has been since it was introduced in early 1953?

A. Yes.

XQ. Your attention is now directed to Exhibit AA, dealer edition of National Painters' Magazine, and particularly to the advertisement of Super-Adit which appears on page 5?

(Magazine handed to the witness by Mr. Upton.)

Are you familiar with such advertising?

A. No, I am not, sir. I see it here. I don't think that I have ever seen the National Painters' Magazine before.

XQ. Well, I am not asking you whether you have seen the magazine before. My question is whether or not you are familiar with that type of advertising?

A. I don't know what you mean by that kind of advertising.

XQ. This ad which you have before you states that, or it is of Super-Adit?

A. It advertises Super-Adit, yes, sir.

XQ. And it states that it is a preventative of mildew, in substance?

A. Yes, sir.

XQ. And have you seen that kind of advertising of Super-Adit before?

A. I have seen copies of ads wherein Super-Adit was advertised as a mildewcide.

XQ. As a what?

A. Mildewcide.

XQ. Or fungicide?

A. Well, it is specifically a mildewcide.

XQ. Mildewcide. And you have seen those in trade journals of national circulation?

A. I say I have seen copies of them.

XQ. Copies of them. For what purpose?

A. I beg your pardon?

XQ. For what purpose; that is, for what purpose were these copies prepared?

A. Well, copies of ads were frequently, not always, were distributed to officers of the company.

XQ. You mean copies were distributed to officers of the company?

A. Frequently, sir.

XQ. And these ads always appeared in nationally circulated periodicals?

A. Yes, sir.

XQ. And the purpose was to create a market for Super-Adit, is that right?

A. I would say, sir.

XQ. Calling your attention again to the advertisement appearing in Exhibit AA, is that typical of the kind of advertising to which you have just referred?

(Document handed to the witness by Mr. Upton.)

A. I am not sure that I can express myself as to whether it is typical or not, sir. I am not proficient in advertising. We have full page ads, perhaps on Super-Adit or other products in magazines. Whether this is typical or not, I don't know.

XQ. Can you say it is similar to that which we have been discussing?

A. Perhaps it is similar, sir.

XQ. Those ads have been appearing in national periodicals since early in 1953?

A. So I have been told, sir.

XQ. And so you know, too, don't you?

A. And so I know, sir.

XQ. Now there has been produced here the file of Milford Paint Company, Plaintiff's Exhibit No. 24, apparently covering some years of advertising. Could you tell me whether this is typical of the kind of advertising that is put out in pamphlet or circular form by Nuodex?

(Documents handed to the witness by Mr. Upton.)

A. Yes, it would be typical of advertising put out by Nuodex.

XQ. That is, these circulars and pamphlets are similar to advertising which has been put out by Nuodex for some years?

A. I would think so, sir, yes, sir.

XQ. And this kind of advertising would be sent out to prospective customers whose name appears on your mailing list, according to their supposed needs?

A. I don't know whether they would all be, sir.

XQ. But some would?

A. Perhaps so.

XQ. Paint manufacturers would receive the advertising relating to Super-Adit?

A. I don't know whether all mailings on Super-Adit would go to all paint manufacturers, sir.

XQ. It would be likely to?

A. Perhaps not.

XQ. Go to paint manufacturers?

A. Might be segregated on a geographical basis. I don't know that.

XQ. This file, Plaintiff's Exhibit No. 24, comes from a company doing business here in New Hampshire?

A. So I understand.

XQ. Located at Milford?

A. Yes, sir.

XQ. And wouldn't you expect like advertising would go to other users of paints here in the territory whose name appears on your advertising list?

A. It is possible, sir.

XQ. Isn't it probable?

A. If you want me to say so, I say it is probable.

XQ. You have referred to Fungitrol as subsidiary; is that the name of some company?

A. Fungitrol was a company. It no longer exists.

XQ. What was its function in relation to Nuodex?

A. Fungitrol was a wholly owned subsidiary. It sold certain fungicides.

XQ. Would that include Adit or Super-Adit?

A. No, it would not.
XQ. And it did business where?
A. Its place of business was in Hillside, New Jersey.
XQ. But I mean what territory was served through this subsidiary?
A. It attempted to do business nationwide.
XQ. And handling what products?
A. Special fungicides which are not capable of distribution through Nuodex's normal agencies for distribution of products.
XQ. Are you familiar with Doggett and Pfeil and its operation?
A. I know of Doggett and Pfeil.
XQ. Do you know anything about their distribution?
A. I don't know how they distribute, sir.
XQ. Do you know that they are now selling or putting out Super-Adit in one-ounce and five-ounce bottles?
A. Yes, sir.
XQ. And on a national basis?
A. I can't say, sir. It is very possible.
XQ. Well, that is the purpose, isn't it?
A. I presume they would like to, sir, but I don't know just how far they distribute.
XQ. And their market depends primarily upon advertising put out by Nuodex?
A. No, sir.
XQ. On what does it depend?
A. I think it will depend on their own means or modes of distribution, sir.
XQ. Do you know what those are?
A. No, sir.
XQ. But the purpose of this national advertising that you have told me is to create a market for the product?
A. To create a market for bulk use of Super-Adit by paint manufacturers, sir.
XQ. Well, isn't this particular ad in Defendant's Exhibit A directed primarily to the consumer?

A. Not to the consumer, sir. Well, yes, you might say that a painter is a consumer. However, if a demand is created on the part of the consumer, the manufacturers will include Super-Adit in their products.

XQ. Yes. One of the purposes of ads such as appears in Defendant's Exhibit A is to create a demand on the part of the user or consumer of paint?

A. To create a demand, sir, so they will ask of suppliers of paint in bulk to incorporate Super-Adit in the paint that is manufactured.

XQ. And those ads, as you have indicated, have been finding their way into national periodicals ever since early 1953 when Super-Adit was placed on the market?

A. I don't know whether this type of approach has been tried since 1953. I see it here in 1955.

XQ. You just told me this was similar to ads which you have seen appearing over that period?

A. Normally, we aim our advertising at manufacturers of paint, sir, not users of paints.

XQ. Yes, you have two types of advertising, the one directed to manufacturers, and the other is to master painters or consumers; isn't that so?

A. Normally, sir, all of our advertising is directed to manufacturers.

XQ. But isn't this particular ad directed to the master painter or the user of paint?

A. That is why I hesitated to say this is typical of our advertising.

XQ Because it is directed to the consumer? To a user?

A. Because it is directed to, I presume, painters rather than manufacturers.

XQ. To create a demand?

A. Yes, sir, to create a demand.

XQ. You told us that Fungitrol ceased to do business in 1952?

A. Yes, sir.

XQ. If I understand you correctly?

A. Correct.

XQ. And how are the products which this subsidiary formerly distributed placed on the market now?

A. Well, Nuodex. When Fungitrol was liquidated, Nuodex took over the business that it previously had.

XQ. And were these products primarily for manufacturers; that is, they were raw materials, so-called, or were they products for the consumer or user?

A. I am afraid that I can't be completely sure about that. Many of the products were products—let's say some of the products could have been used or were directed at growers, produce growers. The products were used in the treating of wood, to protect the wood against rot.

XQ. And since 1952, those products have been marketed by Nuodex directly or through its sales representatives?

A. Such as they have been, sir.

Mr. Upton: You may inquire.

(Question by Mr. Sulloway)

XQ. Was Fungitrol, or any product of the Fungitral Company ever sold in New Hampshire?

A. No, sir.

XQ. Did the Fungitrol Company have any representative in New Hampshire?

A. No, sir.

XQ. The Dosolac—

Mr. Brown: Is he speaking from his own knowledge or recollection?

Mr. Sulloway: Yes, I understand so.

(Questions by Mr. Sulloway)

XQ. Did the Dosolac Chemical Company ever have any agents that came into New Hampshire?

A. As far as I know, no, sir.

Mr. Sulloway: That is all.

The Court: Anything further from this witness?

Redirect Examination

(Questions by Mr. Brown)

Q. With respect to Fungitrol, do you know whether they ever did any business in New Hampshire, or are you just guessing?

A. At the same time that I checked on these sales, I checked on Fungitrol sales. The records are in my office. There were no sales in New Hampshire during the period of its existence.

Q. What about Dosolac?

A. Dosolac, I don't have any such records in my office. I said that was not wholly owned subsidiary. Dosolac was only in operation from the period of December 15 through August, 1952. During that time, it centered its operations in the Boston—I'm sorry, in the Baltimore-Washington area, and in the Philadelphia area. It did not, as far as I know, come into the New England area.

Q. This is Dosolac you are talking about?

A. Dosolac.

Q. Isn't that still in existence?

A. Dosolac is a dormant company now.

* * * * * *

Testimony of John S. Elliott

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

(Questions by Mr. Brown)

Q. State your full name for the record, sir?

A. John S. Elliott.

Q. Where do you live, Mr. Elliott?

A. Madbury, New Hampshire.

Q. Are you the Plaintiff in this action, your corporation?

A. Yes, sir.

* * * * * *

Q. Look, Mr. Elliott, in 1954, after this difficulty arose, did you go and buy some Super-Adit somewhere?

A. Yes, sir, I did.

Q. Where did you buy it?

A. I bought Super-Adit at the Eastern States Farmers' Exchange in Dover in November, 1954.

Q. At retail?

A. At retail, yes, sir.

Q. Did you walk in the store and buy it?
A. I walked in and bought it.
Q. And where else did you buy it in New Hampshire?
A. I bought Adit at the Dover Distributing Company, Third Street, Dover, New Hampshire, at approximately the same time.
Q. And since that time, have you purchased Super-Adit elsewhere in New Hampshire?

Mr. Sullaway: Now, Your Honor, I don't think it is material as to what he has done since.

The Court: It might not be. Let's hear the answer, anyway.

The Witness: Yes, sir.

Mr. Sullaway: Subject to exception.

(Questions by Mr. Brown)

Q. Where?
A. In Concord.

Mr. Brown: That is all. You may inquire.

Mr. Sullaway: No questions.

The Court: Any questions of the witness?

Cross Examination

(Questions by Mr. Upton:)

* * * * *

XQ. In what form did you purchase Adit and Super-Adit?
A. The first purchase that I made in Dover were in five-ounce bottles. The purchase I made in Concord was in a one-ounce bottle.
XQ. And were the five-ounce bottles in packages similar to these, Defendant King's Exhibits CC and DD?
A. Yes, sir.
XQ. And you have referred to a one-ounce bottle. Was the Super-Adit which you purchased in a one-ounce bottle put up in a bottle of that size and with that label?
A. Yes. Similar to that, yes.
XQ. Did any of the Super-Adit which you bought have the name of Doggett and Pfeil on the package or on the bottle?
A. No, sir.

Mr. Upton: You may inquire.

(Questions by Mr. Sulloway)

XQ. Where did you buy the Super-Adit in Concord?

A. At the Eastern States Farmers Exchange.

XQ. The same concern that you bought the five-ounce bottle, is that right; not in the same city, but from the same concern?

A. One of the same concerns.

XQ. In other words, the Eastern States Farmers Exchange is an organization which has its headquarters at West Sprignfield, Massachusetts, isn't it, the main office of the company is at Springfield, Massachusetts, isn't that so?

A. I think that is so.

XQ. And they have branches all over New England?

A. They have over New England, New York and Pennsylvania.

* * * * * *

XQ. At any rate, as I understand it, Mr. Elliott, you did buy a one-ounce bottle of Super-Adit at Concord at the Eastern States, is that right?

A. I bought two one-ounce bottles.

XQ. What I am trying to find out is whether it was the same type of bottle as this, which has been shown you?

A. I have some bottles in my brief case.

XQ. Why don't you get it?

* * * * * *

Mr. Sulloway: Well, it might just as well be marked as an exhibit produced by—

* * * * * *

The Clerk: Received and marked Nuodex Exhibit F, produced by the plaintiff.

* * * * * *

Recross Examination

(Questions by Mr. Upton)

XQ. In order to clear the record beyond a doubt, will you tell us where you purchased this bottle of Adit, King Exhibit DD?

A. You say where did I purchase it?
XQ. Yes, where you purchased it?
A. Dover Distributing Company.
The Court: Is that label off?
Mr. Upton: Yes, the label is off.
(Questions by Mr. Upton)
XQ. And where did you purchase this five-ounce bottle of Super-Adit, Exhibit CC?
A. Eastern States Farmers Exchange in Dover, New Hampshire.
XQ. And these bottles were purchased in November, 1954, these two bottles?
A. Yes, sir.

* * * * * *

XQ. And you told us both purchases were made in 1954?
A. Yes, sir.
XQ. In November?
A. November, 1954.
XQ. You have had a very brief introduction to us. You are engaged in what business?
A. I am engaged in the wholesale growing of cut roses.
XQ. And you are carrying on that business through a company, a corporation, which is the plaintiff in this suit?
A. Yes, sir.
XQ. And this company has its plant or greenhouse where?
A. At Madbury, New Hampshire.

* * * * * *

NUODEX LITTER REPRESENTATION CONTRACT
(PLAINTIFF'S EXHIBIT 2)

Oct. 26, 1955
NUODEX PRODUCTS CO., INC.
ELIZABETH, N. J.
March 10, 1955

Mr. D. H. Litter, President
D. H. Litter Co., Inc.
114 East 16th Street
New York 3, N. Y.

Dear Dave:

As discussed with you several times, we wish to continue with our present arrangement of having your organization as our sales agent. The following conditions express what we feel are our mutual wishes in this matter:

1. We hereby formally designate you as our exclusive sales representative for sales of all presently available groups of Nuodex products, as existing on March 1, 1955, to the paint, printing ink and floor covering and vinyl industries in the following geographical area:

The states of Maine, New Hampshire, Vermont, Connecticut, Massachusetts, Rhode Island and the following areas of New York—all the section east of a north-south line drawn five miles west of Hancock, and five miles east of Massena; and New Jersey—all the section north of an east-west line five miles north of Trenton.

2. Your commission shall be a minimum of 5% of the net invoiced value of shipments of our products covered by, and during the duration of, this agreement, payable monthly and subject to debit for returns or other invoice adjustments following shipment. It is understood that, as previously, sales of our products covered by this agreement will be made at the selling prices and terms authorized by us and that such sales will be subject to compliance with our prior credit authorization or otherwise subject to our prior acceptance. In the case of national accounts involving a multi-plant inter-state operation having its executive purchasing offices, or one or more of its manufac-

turing plants, outside of your Sales Area, as the case may be), a total commission of 5% shall be payable, the distribution of which as between Nuodex agents in the Sales Areas involved shall be as determined according to the terms of our letter to you of August 23, 1954 which became effective October 1, 1954. As stated in that letter, the formula of distribution may be revised by us during the term of this agreement.

3. You shall use your best efforts to secure the maximum possible sale of our products in your Sales Area consistent with our general sales policies and with the more specific guidance and recommendations of our Sales Department which you will receive from time to time.

4. During the term of this agreement you shall not sell any products competitive with our product line as presently existing on March 1, 1955. If we subsequently introduce new products which are competitive or non-competitive with products then sold by you, coverage of those new products by this agreement will be subject to a specific written amendment hereof, upon mutually agreeable terms.

5. The term of this agreement shall be for two years until March 1, 1957. This term will be automatically renewed for one year to March 1, 1958. Thereafter this contract will remain in effect for one year periods after March 1, 1958 unless either party gives written notice of termination or change to the other one year prior to March 1, 1958 or any succeeding March 1st.

6. This agreement has been entered into with your agency in the light of its present controlling ownership and shall not be transferable to a different controlling ownership by sale, operation of law, or otherwise, without our prior written consent.

If this letter is satisfactory to you, please sign and return the enclosed carbon copy to us which shall then constitute the Nuodex sales agency agreement between us, dated as of March 1, 1955. The original retained by you will be your file record.

Very truly yours,

NUODEX PRODUCTS CO., INC.

TMO

F. M. O'Neil

Vice President, Marketing

NUODEX PRODUCTS CO., INC. SALES (Nuodex Exhibit C)

INTO THE STATE OF NEW HAMPSHIRE

NUMBER OF INVOICES AND ANNUAL VALUE TO EACH ACCOUNT
1951-1955*

	1951		1952		1953		1954		1955*	
	Number	Value	Number	Value	Number	Value	Number	Value	Number	Value
Great Falls	None	None	None	None	4	$1,000.00	11	$2,400.00	2	$575.00
H & H	None	None	1	15.64	None	None	None	None	None	None
International Shoe	None	None	None	None	None	None	None	None	None	None
Johns Manville	2	9.62	3	9.28	1	6.30	2	9.82	None	None
Milford Paint	None	None	5	473.93	1	104.63	None	None	None	None
Miljo	None	None	None	None	None	None	None	None	None	None
Nashua Corp.	3	671.25	2	641.25	1	213.75	1	427.50	1	213.75
New England Cable	None	None	None	None	None	None	None	None	None	None
Putnam Mfg.	2	129.75	1	29.00	3	125.27	1	52.25	1	31.00
Resin Research	None	None	1	41.50	1	43.00	2	96.75	2	95.50
Simplex Wire	None	None	None	None	1	292.40	2	438.60	None	None
Totals	7	$810.62	13	$1,210.60	12	$1,785.35	19	$3,424.92	6	$915.25

NUODEX DOGGETT & PFEIL EXCHANGE OF LETTERS
(From Plaintiff's Exhibit 19)

April 30, 1954

Doggett & Pfeil Co.,
Springfield,
New Jersey

Gentlemen:

After a visit with our legal counsel Mr. Cornelius Zabriskie and our Sample Department, I am making final plans for the transfer of all Super Ad-It in bottle business to your good company.

You will find attached the page which will be included in all of our Nuodex Paint Fungicide Manuals, as used by our sales representatives and agents, referring all orders and inquiries to you. Also attached is a form letter to be used by us when inquiries are made to us by mail.

The change in the imprinting of the label (Paragraph 1, my letter of April 14th) should state: Marketed in bottles exclusively by Doggett & Pfeil Co., Springfield, N. J.

In my letter to you of April 14th, a contract (Paragraph 7) was mentioned. Mr. Zabriskie has now advised that no contract is necessary since our name as manufacturer remains on the label. All that is necessary is a written statement from you that the name Super Ad-It, as used in both industrial and retail markets, permanently remains the property of the Nuodex Co., whether the product is marketed by you or not, and that you will apply that name only to goods supplied to you by Nuodex Products Co. Inc.

All registration details, as now being prepared by Mr. Zabriskie, will follow in the immediate future.

Sincerely,

NUODEX PRODUCTS CO., INC.
Walter M. Clark, Manager
Paint Fungicide Sales

DOGGETT-PFEIL LABORATORIES
INCORPORATED
Manufacturing Chemists
Springfield, New Jersey
Telephone Millburn—6-1656-1657

May 6th, 1954

Nuodex Products, Co. Inc.,
Elizabeth, N. J.

Attention: Mr. Walter M. Clark, Mgr.
Paint Fungicide Sales

Gentlemen:

We wish to confirm in writing our understanding that the name "Super Ad-It" as used in both industrial and retail markets, permanently remains the property of your company whether we market Super Ad-It or not, and also that we will not apply the name "Super Ad-It" to any other goods other than supplied to us by your company.

Cordially yours,
DOGGETT-PFEIL LABORATORIES
Sidney H. Doggett, Jr.

POLICY STATEMENT OF MAY 27, 1954
(From Plaintiffs Exhibit 19)

Through the efforts of the Nuodex Research Laboratories from 1947 to 1949, evidence was uncovered proving the need for mildew resistance in certain paints. At this time, very few paint manufacturers were treating paints by adding fungicides at the point of manufacture.

Therefore, in 1949, as a service to the industry, Nuodex made it possible for the consumer to add the necessary fungicide to the paint *on the job*. At the time, it was a recognized fact that this service was *not* the complete answer to the paint manufacturer's mildew problem; it was simply the start. For this reason, Nuodex cooperation with the manufacturer continued with concentration on evaluation tests, exposure test panel data and the development of better paint fungicides (Super Ad-It).

It was also recognized that the merchandising of an additive

TYPICAL SPECIFICATIONS

PRODUCT	% Solids	Gardner-Holdt Viscosity 80° F.	Lbs. Gal 80° F.
NUODEX NAPHTHENATE DRIERS			
Lead 24%	65	A-2	9.65
DMR Cobalt 6%	60	A-1	7.90
Manganese 6%	62.5	A-2	7.95
Zinc 8%	65.0	A	8.00
Zinc 10%	72	F	9.00
Calcium 4%	69.0	H	7.85
Calcium 5%	65.0	B	7.90
DMR Iron 6%	67.0	B	8.15
Pure Cerium 6%	52.0	A-5	7.85
NUODEX ODOREX DRIERS			
Lead 24%	64	A-2	9.20
DMR Cobalt 6%	69.5	C	7.80
Manganese 6%	74.0	D	7.85
Calcium 4%	57.0	A	7.50
NUOLATE DRIERS			
Lead 24%	64.0	A	9.35
DMR Cobalt 6%	71.0	F	8.05
Manganese 6%	74.5	L	8.00
Calcium 4%	74.0	S	7.90
Iron 6%	75.0	G	8.05
NUODEX OCTOATES			
Lead 24%	59.5	A-2	9.25
Cobalt 6%	40.0	A	7.40
Manganese 6%	46.0	A-5	7.55
Zinc 8%	46.5	A-2	7.55
Calcium 5%	54.5	A-3	7.60
Iron 6%	46.0	A-4	7.60
FUNGICIDES			
Nuodex Copper 8%	74.5	W	8.50
Super Ad-It	22.0	A-5	8.15
Nuodex PMN-10	39.0	A-5	8.25
Nuodex PMO-10	44.0	A-5	8.15
Nuodex 72	74.5	D	9.10
Nuodex 100 S.S	52.0	A-3	7.20
Nuodex 100 W.D.	64.0	A	8.05
MIXING and MILLING AIDS			
Nuade	35.0	13" 1 kg. wt. Mobilometer	7.40
Nuomix	100	Z-5	9.05
ANTI-SKINNING AGENTS			
Exkin No. 1	100	A-5	7.55
Exkin No. 2	100	A-5	7.65
LOSS OF DRY INHIBITORS			
Nuact Paste	79.5	58" 0 wt. on Mobilometer	13.9
COBALT PRODUCTS			
Cyclodex	63.5	A	7.70

THERE'S A NUODEX REPRESENTATIVE IN YOUR AREA

CALIFORNIA, Los Angeles 12*
Nuodex Products Co., Inc.
1001 East First Street
Mutual 8184

CALIFORNIA, San Francisco 5*
Cole & DeGraf
417 Market Street
Yukon 6-4363

COLORADO, Denver 2*
Thompson-Hayward Chemical Co.
1501 West 13th Street
Keystone 1281

GEORGIA, Atlanta 3*
R. T. Hopkins
544 Means Street, N. W.
Walnut 9257

ILLINOIS, Chicago 1*
The Cary Company
228 North La Salle Street
Central 6-1426

INDIANA, Indianapolis*
Indiana Naval Stores Co.
P. O. Box 791
Wabash 2431-2

IOWA, Davenport
Thompson-Hayward Chemical Co.
1717 W. 1st Street
2-0115

IOWA, Des Moines 15*
Thompson-Hayward Chemical Co.
Southwest First & Granger
3-8151

KANSAS, Wichita 11
Thompson-Hayward Chemical Co.
727 East Osie Street
5-9606

KENTUCKY, Louisville 2*
B. H. Bovet & Company
1031 West Main Street
Clay 1171-7741

LOUISIANA, New Orleans 18*
Thompson-Hayward Chemical Co.
3111 Lowerline Street
University 8686-7-8

MASSACHUSETTS, Allston 34*
D. H. Litter Co., Inc.
60 Cambridge Street
Algonquin 4-1882

MICHIGAN, Detroit 12*
Baker & Collinson
12000 Mt. Elliott Avenue
Forest 6-2100

MINNESOTA, Minneapolis 15*
Thompson-Hayward Chemical Co.
909 Second Street, S.
Main 5394

MISSOURI, Kansas City 1*
Abner Hood Chemical Company
507 N. Montrail Avenue
Victor 3621

MISSOURI, St. Louis 8*
J. F. Niehaus & Co.
4034 Washington Boulevard
Newstead 4920-21

NEBRASKA, Omaha 8
Thompson-Hayward Chemical Co.
1114 S. Fourth Street
Webster 4700

NEW YORK, Buffalo 7*
Commercial Chemicals Inc.
211 Hertel Avenue
Delaware 5314

NEW YORK, New York 3
D. H. Litter Co., Inc.
114 East 16th Street
Spring 7-4410

OHIO, Cincinnati 2*
B. H. Roettker Company
1811 Union Central Building
Main 1471

OHIO, Cleveland 14*
A. C. Mueller Co.
616 St. Clair Avenue, N. E.
Main 1-2856

OKLAHOMA, Oklahoma City 2
Thompson-Hayward Chemical Co.
828 N. W. Second Street
3-6383

OKLAHOMA, Tulsa 3
Thompson-Hayward Chemical Co.
36 N. Guthrie Street
4-6169

OREGON, Portland 12*
Fred E. Alsop & Co.
935 N. W. Twelfth Avenue
Capitol 7271

PENNSYLVANIA, Philadelphia 2*
Harry W. Gaffney
1510 Girard Trust Building
Rittenhouse 6-4127-28

PENNSYLVANIA, Pittsburgh 19*
John D. Butts
926 Grant Building
Atlantic 1-7680

TENNESSEE, Memphis 7*
Thompson-Hayward Chemical Co.
463 N. Main Street
5-7561

TENNESSEE, Nashville 2*
Post Brokerage Company
509 25th Avenue, North
6-1448 6-2245

TEXAS, Dallas 1*
Thompson-Hayward Chemical Co.
P. O. Box 6226
Federal 6521

TEXAS, Houston 13*
Thompson-Hayward Chemical Co.
2600 Crockett Street
Charter 4-2668

TEXAS, San Antonio 8
Thompson-Hayward Chemical Co.
222 Seguin Street, Box 126
Sannin 7377

VIRGINIA, Richmond 19*
F. V. Gunn & Co., Inc.
1422-24 E. Cary Street
Richmond 3-1130

WASHINGTON, Seattle 4*
D. B. Smith
1016 First Avenue S.
Elliott 5007

WISCONSIN, Milwaukee 2*
R. L. Ferguson
229 E. Wisconsin Avenue
Daly 8-1146

*Warehouse stocks available at these points and in Maryland at Belt's Wharf Warehouse, Baltimore, and New Jersey at 830 Magnolia Avenue, Elizabeth.

Printed in U.S.A. M-5238A-EP-4M

APRIL 22, 1953

NUODEX

STANDARD PRODUCTS PRICE LIST

and typical specifications

DRIERS
FUNGICIDES
MIXING and MILLING AIDS
SPECIALTIES

THREE LITTLE BOTTLES
THAT BUILT THE PLANT

NUODEX PRODUCTS CO., INC.
ELIZABETH F, NEW JERSEY

NUODEX PRODUCTS OF CALIFORNIA, INC.
LONG BEACH 5, CALIFORNIA

DRIERS

NUODEX NAPHTHENATES

PRODUCT	LARGE Price Per Lb.	LARGE Lbs. Net	SMALL Price Per Lb.	SMALL Lbs. Net
* Lead 16%	$ .1725	450	$ .2125	100
* Lead 24%	.2325	450	.2725	100
* Lead 37% (Solid)	.3025	500	.3225	150
DMR Cobalt 6%	.4275	430	.4675	100
Cobalt 10½% (Solid)	.64	430	.66	100
Manganese 6%	.25	430	.29	100
Manganese 10% (Solid)	.355	430	.375	100
Zinc 8%	.235	430	.275	100
Zinc 10%	.285	430	.325	100
Zinc 12% (Solid)	.2975	430	.3175	100
Calcium 4%	.2575	430	.2975	100
Calcium 5%	.3150	430	.3550	100
DMR Iron 6%	.2375	430	.2775	100
Pure Cerium 6%	.75	430	.79	100

ODOREX

* Lead 24%	$ .2425	450	$ .2825	100
DMR Cobalt 6%	.4375	430	.4775	100
Manganese 6%	.26	430	.30	100
Calcium 4%	.2675	430	.3075	100

NUOLATES

* Lead 16%	$ .15	450	$ .19	100
* Lead 24%	.20	450	.24	100
DMR Cobalt 4%	.2675	400	.3075	100
DMR Cobalt 6%	.39	430	.43	100
Manganese 4%	.155	400	.195	100
Manganese 6%	.2175	430	.2575	100
Calcium 4%	.225	430	.265	100
Iron 6%	.18	430	.22	100

* Price of this product has changed since publication of last price list.

DRIERS

NUODEX OCTOATES

PRODUCT	LARGE Price Per Lb.	LARGE Lbs. Net	SMALL Price Per Lb.	SMALL Lbs. Net
* Lead 24%	$ .2775	450	$ .3175	100
Cobalt 6%	.4725	400	.5125	100
Manganese 6%	.2975	400	.3375	100
Zinc 8%	.2725	400	.3125	100
Calcium 5%	.33	400	.37	100
Iron 6%	.2725	400	.3125	100

FUNGICIDES

Nuodex Copper 8%	$ .215	450	$ .255	100
Nuodex Copper 10% (Solid)	.26	450	.28	100
Super Ad-It (Di (phenyl Mercury) codecenyl succinate) (10% mercury metal)	1.69	400	1.74	100
			1.84	40
Nuodex PMN-10 (Phenyl mercury naphthenate) (10% mercury metal)	—	—	1.74	100
			1.84	40
Nuodex PMO-10 (Phenyl mercury oleate) (10% mercury metal)	1.69	400	1.74	100
			1.84	40
Quindex P (Copper 8-Quinolinolate)	—	—	4.50	50
Nuodex 72	.91	450	.96	80
Nuodex 100 S.S.	1.10	80	—	—
Nuodex 100 W.D.	1.25	80	—	—

* Price of this product has changed since publication of last price list.

MIXING and MILLING AIDS

PRODUCT	LARGE Price Per Lb.	LARGE Lbs. Net	SMALL Price Per Lb.	SMALL Lbs. Net
Nuade	$ .3325	380	$ .3725	100
Nuomix	.3425	430	.3825	100

ANTI-SKINNING AGENTS

Exkin No. 1—Exkin No. 2	$1.15	400	$1.20	150
		East of Mississippi		
	1.21	400	1.26	150
		West of Mississippi		

LOSS OF DRY INHIBITORS

* Nuact Paste	$ .3725	380	$ .4125	180

COBALT PRODUCTS (Miscellaneous)

Cobalt Sulphate (hepta)	$ .8175	300	$ .8175	100
Cycloaex	.52	430	.56	100
H.R. Cobalt 254	1.19	125	—	—

* Price of this product has changed since publication of last price list.

Special driers and combinations available on inquiry.
Prices are effective on all shipments made on and after APRIL 22, 1953 and are subject to change without notice.
All prices include containers and delivery to all practical destinations in continental U.S.A.
Prices contained herein are in conformity with regulations of the Office of Price Stabilization.
TERMS: No discount — 30 days net.
TANK CAR SHIPMENTS: $.0125 per pound less than large drum price.

for consumer use was not the primary function of a raw material manufacturer, but Nuodex was willing to offer this service to the industry. Since 1949 the treatment of paints at the point of manufacture has developed to the stage where this service is now not as vital to factory treating as it was from 1949 to 1953.

Therefore, effective May 1, 1954—

DOGGETT & PFEIL LABORATORIES
Springfield, New Jersey

will package and market Super Ad-It *in bottles* to our paint fungicide customers. They will also make available literature, price lists, folders, etc.

It is suggested that you instruct your customers to forward all inquiries and orders direct to them. Any that come to Nuodex, however, will be turned over to Doggett and Pfeil immediately to insure prompt handling.

All orders will be filled and billed at prices now in effect:

1 oz. bottles (packed 1 doz. to case) 67¢ each, less 40% and 25% or 30¢ net to the paint manufacturer.

5 oz. bottle (packed ½ doz. to case) $1.98 each, less 40% and 25% or 89¢ net to the paint manufacturer.

Freight prepaid on shipments of 100 lbs. (gross) and over; F.O.B. Springfield, N. J. for shipments less than 100 lbs.

All shipments via freight or express—postal regulations prohibit parcel post shipments.

SALESMAN JOHNSON'S CALL REPORTS ON PROSPECTS IN NEW HAMPSHIRE TO WHOM SOME NUODEX PRODUCT AT SOME TIME WAS MENTIONED*

Milford Paint Works Div. 3-20-50

* * * * * * * *

Saw Mr. E. Kleinzen—Tech.

Discussed principals and gave literature on resins and oils.

Main products are industrial finishes. Main alkyd use is Reichold 1307. Discussed Falkyd B-2-S.

Keeping us in mind for Alcoa 1571 and Nuodex driers.

*Except as otherwise indicated, these call reports were submitted in Defendant Nuodex's Exhibit E.

Milford Paint Works Div. 5-4-50

* * * * * * * *

Saw Mr. E. Kleinzen—Tech.

Rediscussed Falkyds. Would not change alkyds in standard formulas but would look around for price on volume for gov't spec. work.

States has several drs. Alcoa 1571 on hand. Has been little business using aluminum.

Buy Min. Spts. from AMS in 600 gal. - 1000 gal. quantities in T w.

Discussed Nuodex driers. Has used some Ferro material but will keep Nuo in mind.

Milford Paint Works (Exhibit 5) 6 14 50

* * * * * * * *

Saw Mr. E. Kleinzen

* * *

States using no aluminum and has some 1571 on hand.

I discussed Nuodex driers and urged placing next order with us for drier.

Discussed Falkolins and asked that he call on us for oils.

Min. Spts from AMS T 20.

Will call us for alkyd quote when bidding for government contracts.

Miljo Chemical Co. 8-16-50

* * * * * * * *

Saw Mr. A. B. Harding—owner.

Also talked with John Hoag.

Mr. Harding used to be with Monsanto Chem.

Subjects ordered 1500 Toluol earlier this month. Will be ordering again soon. Use approx. 2000 gal mo.

Use no maleic resins—leather finishes.

(Taken care of) Placed order for 10= can Alcoa 822.

Use no driers.

Resin Research, Inc. 9-27-50

Saw Mr. C. W. Priest.

Checked sample K-1515. Kicked out of solution. He used ethyl alcohol. Pointed out that glycol should be used — too slow evap.

Send *1 lb. sample* K-424 so he will have it on hand. [Boston will handle]

Uses a little cobalt drier. Quoted on 100 lb. container Nuodex Co 6.

Manchester Narrow Fabrics Co. (Exhibit 5) 5 10 51

* * * * * * *

Saw E. C. Maxwell V-P A-(Will report to Nuodex. H.C.C.)

Ffd. lead subjects were awarded contract on webbing. Having treating done by Pentucket Textiles, Haverhill and have no intention of doing same themselves.

Milford Paint Works (Exhibit 5) 5 10 51

* * * * * * * *

Saw Mr. E. Kleinzen Tech

(Taken care of) Discussed aluminum situation. Placed order 200 lb each Alcoa 205 and 1571.

Discussed Falkyds. Use Reickold 1307, 1331 and 1341. What is match for 1341? (DHL - NY - Please Advise. H.C.C.— *No match.*)

Discussed driers and urged ordering Nuodex materials when in need.

Milford Paint Works (Exhibit 5) 8 20 51

* * * * * * *

Saw Mr. F. H. Fletcher.

Discussed Falkolins. Will be glad to call us for quotes and will do.

Checked on Alcoa past due. Will pay by Sept. 10th. Money has been slow.

Send samples and data on Nuomix and Litenite W. S. (Boston will handle, H.c.c. ordered 8 24.)

Has enough drier on hand.

F. A. Putnam Mfg. Co. (Exhibit 20) 8 21 51

* * * * *

Saw Mr. Carl Johnson
Harry Larson P.A.

Use small amounts of Santocel. Send sample and data on Syloid 308. (8 24 ordered.)

Will send in order for Nuolate Cobalt. (Boston will handle.)

Urged switching from Ohio Bronze to Alcoa 422.

Send Sample K 1717 and data (Ordered 8 28)

Send sample and data on Nuoct Paste. (Boston will handle. Ordered 8 28.)

Milford Paint Works (Exhibit 5) 10 15 51

* * * * * * * *

Saw Mr. Clyde Bishop—Chem

* * *

Mr. F. H. Fletcher was out. H. Parks is consulting here and training Bishop.

Checked need for aluminum and driers

Discussed Falkolms and Falkyds

Send sample of Exkin #1 and data.

Send data on Nuomix and Litenite W. S. (Boston will do. Sent 10 30.)

Nashua Gummed and Coated Paper Co. (Exhibit 20) 11 20 51

* * * * * * * *

Saw Mr. W. F. Evans VP and PA

Subjects use approx 7000 lbs year of Alcoa 552. They buy in 2 or 3000 lb. lots. Were given only 700 lb quarter allocation but have applied for interim quota of 2200 lbs quarter. They cannot run it all on 700 lbs. We are shipping 300 lbs. to finish off their last order to Raffi.

Discussed T T del. of Xylol.

Order Nuodex 84 as needed.

Milford Paint Works (Exhibit 5) 11 20 51

* * * * * * * *

Saw Clyde Bishop Tech.
Harold Parks Consultant

* * * *

Send samples one qt. of Falkidine J O and Falkidine 20 Boston will handle 11 23. Ordered 11 23.)
We will get drier business.
Discussed Exkin #1
We get their aluminum business.
What was wetting agent used in paper on use of Morehouse at A. C. Conontron?

Milford Paint Works 2-26-52

* * * * * * * *

Saw Mr. Clyde Bishop—Tech.
Will be ordering some Alcoa material soon.
Have enough driers for now.
Discussed Falk oils and alkyds.

Nashua Gummed & Coated Paper Co. 2-26-52

* * * * * * * *

Saw Mr. Lates—APA.
Everything OK on Alcoa 552.
Saw Mr. Austin Davis—Tech.
K-1717 working quite well on laminating adhesive but this may be slow or fast in developing some volume.
Will send qt. sample of Nuodex Co 6 for use with polyester resins. [Taken care of]

New England Paint Works 2-26-52

* * * * * * * *

Saw Mr. W. G. Rhines.
Subjects mfg. cubed tints.
Gave Falk oil and resin folder, data on Alcoa, and Nuodex Tech Manual.
Discussed and gave sample Sylord 963.
Have approved Alcoa 408 and Reynolds 30 for use in aluminum cubes. Reynolds have stated they will give them some national ad-

vertising. Will discuss with H. Dodge and take him in here if possible soon.

Milford Paint Works 6-11-52

* * * * * *

Saw Mr. F. Fletcher, C. Bishop.

OK — Ordered 5 gal. Nuact. Will send data.

OK — Will send samples B-2-S and BB-2-S.

Ordering Alcoa Nuodex and Falk materials as needed.

Have been using Reichold 1341 (60% Xylol and VMP). This is phenolated linseed type. Acid 8-12. Visc Z2-Z4 air dry @ 77° F. Dust free 1 6 > 1 3 hr. Tach free 3 hrs. Hard 6-8 hrs. Del. service has been slow.

Milford Paint Works 7-10-52

* * * * * * * *

Saw Mr. Clyde Bishop—Tech.

Discussed ARCC paint. Brushed out sample of blue and looked good. Will discuss with Mr. Fletcher and H. Parks and will advise of further interest.

Checked need for driers. Will send in Cobalt order soon.

Have enough Aluminum.

Ordering Falk items as needed. Will send Falk formulation book.

Milford Paint Works 8-20-52

* * * * * * * *

Saw Mr. Clyde Bishop

OK - Discussed Falkyd J-97. Will send qt. sample of same and write.

Mr. Fletcher was out so could not get order for ARCC paint. They will, however, need 2 or 3 sets of color chips to use in selling same.

Order Nuodex and Alcoa items as needed.

Nashua Corp. 2-10-53

Saw Mr. F. P. Richardson—APA.

Ordering K-1717 and Nuodex 54 as needed.

Have not been using much aluminum in past to mos., so they still have enough on hand of our material.

Milford Paint Works 2-10-53

Saw Mr. C. Bishop—Tech.

Mr. Fletcher was out.

Business has been quite slow. Have enough materials on hand for present.

Rediscussed Super - Adit.

F. A. Putnam Mfg. Co., Inc. 3-9-53

Saw Mr. H. Lawson—PA. C. Johnson—Tech. Dir.

Order Nuodex driers as needed.

Discussion on Nuact and gave sample.

Urged purchase of Alcoa 422 and gave Alcoa data folder. Pointed out price and delivery against Ohio Bronze. Will likely order.

Milford Paint Works 3-26-53

Saw Mr. C. Bishop—Tech.

Mr. Fletcher was out.

OK — Will send sample PVA masonry surface sealer for damp brick. Gave data.

Have enough Alcoa and Nuodex items on hand.

Again discussed Super - Adit.

Nashua Corp. 3-26-53

Saw Mr. J. C. Tuttle—APA.

Discussed Ped. solvents. Will del. 2 qts. S. Troluoil and data and price 1-40 drs.

Will send 2 Krumbhaar booklets. Order K-1717 resin as needed. Use should increase.

Have 4 drs. Alcoa 552 on order.

Order Nuodex 84 as needed.

Milford Paint Works 5-28-53

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Saw Mr. C. Bishop—Tech.

Business is picking up now but have enough materials on hand for the present.

Did not complete tests on polyeryl acetate sealer as yet.

Were not too successful in selling ARCC latex paint they got in

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Nashua Corp. 5-28-53

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Saw Mr. J. Tuttle—APA.

Order Alcoa 552 as needed but use is off.

Also order K-1717 and Nuodex 84 when needed.

Writer will take in S. Troluoil sample next call.

Great Falls Bleachery and Dye Works Inc. (Exhibit 23) 6-3-53

Saw Mr. N. T. Hainsworth—Pres.

Subjects made some trial runs with Nuodex 100 WD in cloth. Have submitted same to Brunsene but not had an order yet. States they also submitted some to Goodall-Sanford and it was rejected.

General Electric Co. 6-3-53

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Saw Mr. G. L. Hayes—Buyer.

Checked need for aluminums. States using 50 lb. wk. and have enough on hand for some time to come but will contact us for next order.

F. A. Putnam Mfg. Co., Inc. 7-7-53

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Saw Mr. Carl Johnson—Tech Dir.
Discussion on rare earth driers.
OK — Will send samples Nuodex Cerium 6 and Zirconium 8%.
Wants sample unpolished aluminum.
OK — Will order sample Atomized 101.

Milford Paint Works 8-13-53

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Saw Mr. F. Fletcher.
OK — Placed order 5 drs. Apcothmimiex and 1 drum Alcoa 205.
Will order Nuodex Cobalt soon.
Buy Min. Spts. and Xylol T 20 N. E. Chem. Supply of Manchester —

Nashua Corp. 8-13-53

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Saw Mr. D. Lates—P.A.
Order Alcoa 552 as needed but use is way off at present.
Use of K-1717 is going right along and should increase.
Order Nuodex 84 as needed.

Great Falls Bleachery and Dye Works Inc. (Exhibit 23) 8-31-53

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Saw Mr. Hainsworth—Pres.
R in 940 lb Nuodex 100 WD on hand and was satisfactory but have no more orders where same is needed.

Milford Paint Works 9-22-53

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Saw Mr. F. H. Fletcher
Discussed past due bills. Has cut down payables by 2/3 this past year but is still slow. Order Alcoa 205, Nuodex driers and Apcothimier (drums).
Will send Alcoa booklet on testing aluminum paint performance.

Nashua Corp. 9-22-53

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Saw Mr. J. C. Tuttle—APA.

Use Toluol (2000 mo.), Xylol (4000 mo.) and Textile Spts (will increase) all in drums. Putting in tank farm for T T del. Wants second source. OK—Will del. gal. samples of Toluol, Xylol, Super Petrolene, Super Troluoil and send data and price information.

Order Alcoa 552, Nuodex 84, and K-1717 as needed.

Nashua Corp. 10-5-53

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Saw Mr. J. C. Tuttle—APA.

Del. gal. samples of Toluol, Xylol, S. Petroline, and Super Troluoil for evaluation.

Milford Paint Works 11-10-53

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Saw Mr. C. Bishop.

Nothing new at present and has enough of our items on hand. Will order some driers before long.

Nashua Corporation 11-10-53

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Saw Mr. J. C. Tuttle — APA.

Checked on A-P samples. Toluol and Xylol satisfactory but don't have tanks connected yet for T T del. States ink foreman will not change from Textile Spts to Super Petroline at present because of odor difference but this is not final. Writer was put off as to seeing ink man but will go in another door next call.

Milford Paint Works 12-16-53

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Saw Mr. C. Bishop—chem.

Not much new at present and have enough materials on hand. Subjects have been very slow paying on invoices.

Nashua Corp. 12-16-53

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Saw Mr. J. C. Tuttle—APA.

We have Alcoa order to ship 1-4-54.

Checked need for Xylol T T. Tanks are in but are not connected up yet — will probably be several weeks.

Nashua Corp. 1-6-54

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Saw Mr. J. C. Tuttle.

Arranged to have a drum of Alcoa 552 shipped down to Advance Coatings Co. since we are out of stock in N. Y. and Boston.

Still don't have tanks piped up for T T del. Use 50,000 yr. Xylol and 25,000 Toluol. Seemed more inclined to give us some Xylol business when ready.

Ordering K-1717 resin as needed.

Nashua Corp. 2-9-54

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Saw Mr. F. Richardson—APA.

Using K-1717 resin approx. 5000 lbs. mo. and should continue right along. W. Manko offered 1c saving on quantity but will likely buy by the month. Would like a similar resin at a lower price so they could go after cheaper lead seal business. Suggested we see ch. chem. to offer some other resins if possible.

Saw Mr. A. Davis—Ch. Chem.

Mr. Davis sent over a Mr. Hill who was not able or willing to give us enough information so we could be of assistance.

Nashua Corp. 3-4-54

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Saw Mr. J. C. Tuttle—PA.

Urged purchase of Apco Xylol T T. Just got tanks connected up and for present will buy from Esso from whom they bought 60-80 drs. per month for years. [OK—Wrote Ken Bubet]

Saw Mr. A. Davis—Ch. Chem.

Inquired for a resin just like 1717 with a higher M. P. (say 140

C. ball and ring. The higher M.P. would give better results on present formulation and allow other uses. Writer will get suggestions.

New England Chemical Supply Co. 3-4-54

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Saw Mr. A. Woronaka.

Discussed accounts and competitive situations. Subjects are moving a good amount of our M.S. and Xylol but get plenty of competition from AMS.

Is considering doing his own trucking from Allston so that he could leave solvent on truck and make deliveries.

Offered use of dry cleaning lessons but does not have much interest in same at present.

Nashua Corp. 4-15-54

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Saw Mr. Frank Richardson—APA.

Quite satisfied with service on K-1717 resin and expects to continue ordering regularly.

Saw Mr. D. R. Cahill — Tech.

We were referred to Mr. Cahill by A. Davis — ch. chem.

Advised would like a little more hardness in 1717 and Krumbhaar will try to modify.

Use some Pentalyn G and stated would check K-303 but not likely to change.

Use an ammonia soluble resin made special for them. Will send sample K-1616 and possibly one with lower M.P.

Nashua Corp. 6-16-54

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Saw Mr. F. Richardson — APA.

Situation still same on K-1717 resin with use off some; however, one product it is used in may develop to a very good volume in the future.

Saw D. R. Cahill—Chem.

Have made some tests on K-1616 resin and it looks like it might work out.

Have done nothing on testing K-808.

Discussed K-808 and will send 5= sample and data.

New England Chemical & Supply Co. 6-16-54

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Saw Mr. Stan Krystainich, Joe Zielinski.

Mr. Woronaka out. Moving very good volume of Stock-Sol.

Gave information on Dionne Cl.

Went over story on Statement of Ultimate Vendor and Fed. Exemp. Cert.

Milford Paint Works 7-13-54

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Saw Mr. F. H. Fletcher.

Discussed alkyds. Use R&H D-65-A in 5 dr. lots. Also Reichold P-605, 1331, and 4250 Styresol. Also sometimes use type of Falkyd B-3 (dark) in VM&P.

Sometimes buy in 1600 lb. lots Magua 777 @ 34c del. Uses as specification standard paste.

OK — Sending sample Alcoa 231 and asphalt data.

Have enough driers on hand. Urged purchase of Nuodex material. We lost business about a year ago on credit but he states that he is now on 60 day basis with assets less bldg. of 73,000 and liabilities of 28,000.

Miljo Chemical Co. 7-13-54

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Saw Mr. A. B. Harding, J. Haug.

Doing very little with aluminum. Again discussed Alcoa 230 and 231 for asphalt coating.

Buy Toluol and Xylol T T Koppers with occasional T w Xylol from Barrett to fill in. T w price is 43c (2c under petroleum price).

Buy Teglac Z-152 (60% Toluol) in drums.

Have a good product which contains K-1717 but have not been able to sell it as yet.

F. A. Putnam Mfg. Co. 7-13-54

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Saw Mr. H. Lawson—PA.

Order Nuodex driers as needed.

Urged purchase of Alcoa 422 and pointed out price advantage. Will talk with C. Johnson who was out and likely order same.

Using small amount K-1717 (last bought 50 lb.) and may increase.

Gave data on Nuosperse.

Nashua Corp. (Exhibit 16) 8-23-54

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Saw Mr. F. Richardson APA

OK—States will place order for 500 lbs. K-1717 resin for Sept. billing.

Discussion on some 1717 resin they have put on one side because of green color. J. A. Talked with A. Davis—ch. chem. on phone & advised that it should not give any trouble. They are, however, going to check it over.

I did not see D. Cahill—chem. who was on vacation, to check on 1616 and 3035 samples.

Milford Paint Works 9-22-54

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Saw Mr. F. H. Fletcher.

Has enough aluminum and driers on hand.

May use Super Ad-It next Spring.

OK — Discussed Thixain. Ordered 3 bags to try against Beutane 34.

Gets Min. Spts. from New England Chem. and Supply.

Main alkyd use is R&H D-65-A in 5 dr. lots. Will buy from us at equal quality and price. Writer is to advise later on price.

Nashua Corp. 9-22-54

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Saw Mr. F. Richardson APA

Using up greenish K-1717 on hand and apparently will be satisfactory. Since that material was received they ordered another 5000 lb. K-1717 on 8-23. He will be checking his stock this week and will order again if low enough. Expect usage to increase.

New England Chemical Supply Co. 9-22-54

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Saw Mr. A. Woronaka.

Order ±10 Min. Spts. and Xylol as needed T T.

Shell has been trying to get him as a distributor in N. H. but he does not seem very interested in their proposal. The reason Shell is looking is that the state took their Manchester terminal to make way for new toll road.

General Electric Co. 10-5-54

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Saw Mr. G. L. Hayes—Buyer

Called to discuss and urge purchase of Alcoa 205, but Mr Hayes was out for the day.

Great Falls Bleachery and Dye Works Inc. (Exhibit 23)

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Saw Mr. O. F. Colburn. P.A.

Ordering Nuodex 100 WD as needed and quite satisfactory. He did suggest, however, that we ship by different trucker to give better delivery service. (Will write Nuodex. O.K.)

Miljo Chemical Co. 10-5-54

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Saw Mr. John Haug.

Discussed and gave samples of Alcoa 230 and 231.

Also discussed and gave sample of Nuosperse.

Urged purchase of Apco Toluol and Xylol T T.

Still have hopes that product containing K-1717 resin will develop.

International Shoe Co. (Exhibit 15) 11-1-54

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Mr. Koehman was out. Talked with K. Blaine (Chem. who advised that they have done some experimental work with vinyls and may extrude some sometime in future. Discussed and gave literature on Nuostaves for Mr. Koehman.

New England Cable Co. 11-1-54

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Saw Mr. S. Dunsford—P.A.

Use no vinyl compound. Work only with rubber. May go into vinyl sometime but not too likely. Gave literature on Nuostabes for possible reference.

Nashua Corp. 11-1-54

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Saw Mr. D. R. Cahill (Chem.

Discussed Nuostabes. Have no interest in and do not use any vinyl stabilizers.

[Krumbhaar]

Checked on Krumbhaar sample JT-389-98. Has not had time to evaluate same as yet. On K-1616 resin; it was satisfactory as an ammonia soluble resin, but the melting point was too high. Need M.P. 135-145° C. and cost of about 25c lb. Will send sample K-1515 resin. [O.K.]

DEPOSITION OF CHARLES J. GOTTHARD*

* * * * * * * * *

93 Q. Now, Mr. Gotthardt, the King Company has brought an action in the courts of Massachusetts against the Nuode X Products Company, has it not?

Mr. Sanders: Mr. Sulloway,—

* For date, parties present, etc. See beginning of the deposition at PRA36.

Mr. Brown: I object.

Mr. Sanders: I dislike very much to ever instruct a witness not to answer a question; and if I thought that the questioning had any possible relevancy, I certainly would not instruct him not to answer.

I would like to ask you, would you explain to me in what way this line of questioning is relevant?

Mr. Sullaway: We think, under the decisions relating to jurisdiction, we think it is pertinent to point out where the bulk of the litigation is or where the litigation could most properly be held; and it is on that ground I am going to ask him about the suits in Massachusetts.

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Mr. Sanders: I am now directing the witness not to answer this line of inquiry; and the deposition may, so far as I am concerned, be deemed suspended until we have had an opportunity to confer with reference to this new line of inquiry with the United States District Judge.

Mr. Sullaway: You are instructing the witness not to answer?

Mr. Sanders: Yes.

(Whereupon, the deposition was suspended as above stated.)

ORDER OF DEC. 1, 1955

Upon consideration of the question presented at hearing, counsel are instructed that the deponent Charles J. Gotthardt, is not required to answer the question submitted.

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HEARING OF DEC. 5, 1955 ON NUODEX MOTION THAT GOTTHARDT DEPOSITION BE NOT CLOSED

Deputy Clerk: The first case this morning is Civil No. 1465,

W. H. Elliott & Sons, Co., Inc., vs. E. & F. King, Co., Inc., and Nuodex Products, Co., Inc.

For the plaintiff, Stanley M. Brown. For the defendants, Frank Sulloway and John Sanders. Hearing on defendant Nuodex motion that deposition of Charles J. Gotthardt be not closed.

Mr. Sulloway: Shall I proceed, Your Honor?

The Court: I think you better. I want to examine this just a moment.

Mr. Sulloway: Yes.

The Court: Well, the question that was heard and acted upon last week involved the direct question to Mr. Gotthardt whether the King Company brought an action in Court in Massachusetts against Nuodex Products Company. That was so, wasn't it?

Mr. Sulloway: Yes.

The Court: I ruled that question need not be answered. Now you pose the question of whether or not you may ask other questions under your motion, is that it?

Mr. Sulloway: Yes, Your Honor. If Your Honor rules or if it is clear on the record that Your Honor has ruled that the question may not be answered because questions as to the litigation in Massachusetts are not material—

The Court: I didn't intend to rule every question wasn't material. I can only deal with the question that was presented. I think I have. I think I fully dealt with that. Now by analogy, if you want to consider it in that fashion, I suppose—I am not making any ruling that I would consider that similar questions would be equally inadmissible—but I don't want to undertake the proposal of ruling on questions until they are propounded.

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Mr. Saunders: Of course, Your Honor, there is a very easy short cut to this whole thing. The evidence in this case is not closed as yet. Mr. Sulloway can very readily obtain from proper authorities in Massachusetts certified copies of the writs and declarations. Then he can offer them here. We can object, and you can rule.

The Court: Offer them where, when?

Mr. Sanders: In this proceeding.

Mr. Sulloway: As part of the evidence.

The Court: You don't mean the taking of the deposition, you mean in the proceeding itself.

Mr. Sanders: Yes, sir.

Mr. Sulloway: Yes.

The Court: I suppose you could do that. I suppose you could do that, and that would take it out of the deposition, you mean, is that right?

Mr. Sanders: Yes.

The Court: That would—

Mr. Sulloway: It isn't important to me, Your Honor, whether this witness of the King Company told us or whether the fact was in evidence.

The Court: You can show it otherwise.

Mr. Sulloway: Well, I mean, as this was the last witness, I proposed to show it out of him. Now if I am permitted to offer the evidence and then Your Honor rules on it, they will, and the other side will agree to statements or certified copies of writs pending, we can submit the matter to you.

The Court: That is a solution of it, surely. If you wanted to waive this motion and produce these documents before the close of all the evidence, then get a ruling on that, whether relevant or otherwise, material, that would protect your rights and clarify the whole picture.

Mr. Sulloway: Yes, Your Honor. And I was assuming I could do that as part of the evidence. I haven't got to my evidence at all, except one deposition.

The Court: I know, Mr. Sulloway, but of course the best proof of all is the certified copies of these pending actions.

Mr. Sulloway: All right, Your Honor.

The Court: Now I think Mr. Sanders has a good suggestion. You can bring those in, offer them, and I will rule on them, and you can then dispense with the necessity of asking any witness that, isn't that so?

Mr. Sulloway: Yes, Your Honor.

The Court: Won't that take care of your problem?

Mr. Sulloway: Yes.

The Court: Supposing I note on your motion you do not desire to press.

Mr. Sulloway: It is understood I may offer

The Court: I will not put that on the motion. It will be understood here that you can offer it.

Mr. Sulloway: And Your Honor will rule.

The Court: And Mr. Brown agrees to the same thing, I presume, don't you?

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Mr. Brown: My only objection, Your Honor, is the indefinite continuance of the hearing, and I object on that basis.

The Court: Well—

Mr. Brown: Not as to the proposed procedure to get that matter for ruling, no, Your Honor. I think that is perfectly proper. We suggested it the other day.

The Court: That is what I am talking about. The procedure is desirable, in my opinion.

Mr. Brown: Yes.

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LETTER, ATTORNEY SULLOWAY DATED DECEMBER 8, 1955, OFFERING CERTAIN EXHIBITS

Hon. A. J. Connor
c/o William H. Barry, Clerk

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Re: *Elliott* v. *King and Nuodex Products*

Dear Judge Connor:

I hand you herewith the following:

1. Certified copy of the writ and declaration in a suit brought by Arnold-Fisher Company against E. & F. King & Co. and Nuodex Products Co., Inc., pending in the Superior Court for Middlesex County, Massachusetts
2. Certified copy of the writ and declaration in a suit brought by Peirce Brothers, Inc., against E. & F. King & Co. and Nuodex Products Co., Inc., pending in the Superior Court

for Middlesex County, Massachusetts.

3. Certified copy of writ and declaration in a suit brought by Johnson Bros. Greenhouses, Inc., against E. & F. King & Co. and Nuodex Products Co., Inc., pending in the Superior Court for Middlesex County, Massachusetts.

4. Certified copy of writ and declaration in an action brought by E. & F. King & Co. against Nuodex Products Co., Inc., pending in the Superior Court for Middlesex County, Massachusetts.

Under the agreement made recently at court we are offering these in lieu of questions to the witness Gotthardt, whose deposition has been taken. We offer these documents, as stated at the hearing, on the ground that they are competent and material on the issue before the court. * * *

WRITS AND DECLARATIONS
MASSACHUSETTS ACTIONS

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

To the Sheriffs of our several Counties, or their Deputies

LS Greeting.

WE COMMAND YOU to attach the goods and estate of Nuodex Products Co., Inc., a corporation duly organized under the laws of the State of New York, having its principal office in Elizabeth, State of New Jersey, and having an usual place of business in Medford, Middlesex County, Massachusetts, to the value of $850,000.00 dollars, and summon the said defendant (if it may be found in your precinct) to appear before our Justices of our Superior Court, at Cambridge within and for our said County of Middlesex, on the first Monday of December next; then and there in our said Court to answer unto E. & F. King & Co., Incorporated, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, in an action of Contract or Tort to the damage of the said plaintiff (as it saith) the sum of $850,000.00 dollars, which shall then and there be made to appear with other due damages. And

have you there this writ with your doings therein

Witness, Paul C. Reardon, Esquire, at Cambridge, the twenty fifth *day of October, in the year of our Lord* one thousand nine hundred and fifty-five.

A TRUE COPY ATTEST:

Margaret C. Long
Deputy Sheriff

Charles T. Hughes
Clerk

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court

No.

E. & F. KING & CO., INCORPORATED

vs.

NUODEX PRODUCTS CO., INC.

PLAINTIFF'S DECLARATION

COUNT 1. The plaintiff says that on January 9, 1953 and at various dates thereafter it purchased a compound known as "Super-Ad-it" from the defendant which compound the defendant, as an inducement to such purchases, expressly warranted would, when added to paint manufactured by the plaintiff, serve as a safe and effective fungicide; that the plaintiff added such compound to its paint in accordance with defendant's instructions and sold such paint to the general public; that said "Super-Ad-it" proved to be neither an effective nor a safe fungicide as warranted, with the result that plaintiff has suffered great loss of good will and has been subjected to numerous suits and claims for damages by its customers on account of the ineffective and unsafe nature of said "Super-Ad-it"; and that within a reasonable time after it learned or should have learned of the ineffective and unsafe nature of said "Super-Ad-it" the plaintiff gave due notice thereof to the defendant.

COUNT 2. The plaintiff says that on January 9, 1953 and at various dates thereafter it purchased a compound known as "Super-Ad-it" from the defendant, which the latter manufactured and sold to the general public as a fungicide to be added to paints; that the defendant well knew that the plaintiff purchased

said "Super-Ad-it" for the purpose of mixing said "Super-Ad-it" with the plaintiff's own paints which it manufactured for sale to the general public; that the said compound was not reasonably fit for a fungicide for addition to paints in that it was both ineffective and unsafe; that the plaintiff added said "Super-Ad-it" to its own paint in accordance with defendant's instructions and sold such paint to the general public; that said "Super-Ad-it" proved to be neither an effective nor a safe fungicide as warranted, with the result that plaintiff has suffered great loss of good will and has been subjected to numerous suits and claims for damages by its customers on account of the ineffective and unsafe nature of said "Super-Ad-it"; and that within a reasonable time after it learned or should have learned of the ineffective and unsafe nature of said "Super-Ad-it" the plaintiff gave due notice thereof to the defendant.

COUNT 3. The plaintiff says that on January 9, 1953 and at various dates thereafter it purchased a compound known as "Super-Ad-it" from the defendant for the purpose of adding the same as a fungicide to paints manufactured by it; that at various times the defendant represented to the plaintiff that said "Super-Ad-it" was a safe and effective fungicide when added to paint in accordance with the defendant's instructions; that said "Super-Ad-it" was neither a safe nor an effective fungicide when so added to paint as the defendant well knew or should have known; that in reliance upon said representations of the defendant plaintiff added said "Super-Ad-it" to paints manufactured by it in accordance with defendant's directions and sold said paint to the general public; that as a result of the ineffective and unsafe nature of said "Super-Ad-it" the plaintiff has suffered great loss of good will and has been subjected to numerous suits and claims for damages by customers to whom paint containing said "Super-Ad-it" has been sold, all to the damage of the plaintiff.

By its attorneys,

/s Hemenway & Barnes
/s Philip B. Bazzell
/s Charles M. Ewing

COMMONWEALTH OF MASSACHUSETTS

Middlesex, SS.

To the Sheriffs of our several Counties, or their Deputies,

Greeting:

WE COMMAND YOU to attach the goods and estate of E. & F. King & Co., Incorporated, a Massachusetts corporation of Norwood, Massachusetts, and Nuodex Product Co., Inc., a New York corporation, of Elizabeth, New Jersey

to the value of $150,000 dollars, and to summon said defendants (if they may be found in your precinct) to appear before our Justices of our SUPERIOR COURT, at Cambridge, within and for our said County of Middlesex, on the first Monday of April next; then and there in our said Court to answer unto Arnold-Fisher Company, a Massachusetts corporation, of Woburn, Massachusetts

in an action of contract or tort to the damage of the said Arnold-Fisher Company (as it saith) the sum of $150,000 dollars, which shall then and there be made to appear with other due damages. And have you there this writ with your doings therein.

Witness, JOHN P. HIGGINS, Esquire, at Cambridge, the fifteenth day of February, in the year of our Lord one thousand nine hundred and fifty-five.

s Charles T. Hughes
Clerk

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT

NO.

ARNOLD-FISHER COMPANY

v.

E. & F. KING & CO., INCORPORATED

AND

NUODEX PRODUCTS CO., INC.

DECLARATION

Count I. Defendant Nuodex Products Co., Inc., is a manufacturer of industrial chemicals, and defendant E. & F. King &

Co., Incorporated was a manufacturer and retailer of industrial paints; defendant Nuodex Products Co., Inc., knowing defendant E. & F. King & Co., Incorporated, to be such a manufacturer and retailer, negligently manufactured, sold and delivered to defendant E. & F. King & Co., Incorporated, a certain mercury compound known commercially as "Nuodex Super-Ad-It", knowing (or it should have known) it to be the purpose of said defendant E. & F. King & Co., Incorporated, to use said mercury compound in the manufacture of a certain paint to be retailed and sold to the public for use in the painting of greenhouse interiors, and knowing (or it should have known) that said mercury compound was deleterious and harmful to the growth of plants, especially of rose plants; said defendant E. & F. King & Co., Incorporated, not knowing said mercury compound to be deleterious and harmful to the growth of plants, used said mercury compound in the manufacture of a certain greenhouse paint and retailed and sold same in 1954 to plaintiff Arnold-Fisher Company, which operates greenhouses for the growing of roses and is engaged in the commercial sale thereof, for use in the painting of greenhouse interiors; plaintiff Arnold-Fisher Company used the said greenhouse paint in the painting of greenhouse interiors, not knowing the same contained a mercury compound which was deleterious and harmful to the growth of plants; as a result of the negligence of said defendant Nuodex Products Co., Inc., said mercury compound used in said greenhouse paint gave off a mercury vapor which killed many thousands of the plaintiff's rose bushes, and greatly diminished the production of roses, thereby resulting in great loss of profits, and necessitating the expenditure of great sums of money to eliminate the effects of said mercury vapor and for the replacement of its rose bushes, all to its great damage.

Count II. - Defendant E. & F. King & Co., Incorporated, was a manufacturer and retailer of industrial plants; said defendant E. & F. King & Co., Incorporated, negligently manufactured a certain paint containing a certain mercury compound known commercially as "Nuodex Super-Ad-It" to be retailed and sold to the public for use in the painting of greenhouse interiors,

knowing (or it should have known) that said mercury compound was deleterious and harmful to the growth of plants, especially of rose plants; said defendant E. & F. King & Co., Incorporated, retailed and sold said paint to plaintiff Arnold-Fisher Company, which operates greenhouses for the growing of roses and is engaged in the commercial sale thereof, in 1954 for use in the painting of greenhouse interiors; plaintiff Arnold-Fisher Company used said paint in the painting of greenhouse interiors, not knowing the same contained a mercury compound which was deleterious and harmful to the growth of plants; as a result of the negligence of said defendant E. & F. King & Co., Incorporated, said mercury compound in said paint gave off a mercury vapor which killed many thousands of the plaintiff's rose bushes, and greatly diminished the production of roses, thereby resulting in great loss of profits, and necessitating the expenditure of great sums of money to eliminate the effects of said mercury vapor and for the replacement of its rose bushes, all to its great damage.

Count III. Plaintiff Arnold-Fisher Company is engaged in the business of operating greenhouses for the growing of roses and the commercial sale thereof; defendant E. & F. King & Co., Incorporated, was a manufacturer and retailer of industrial paints; plaintiff Arnold-Fisher Company purchased from said defendant E. & F. King & Co., Incorporated, in 1954 a certain paint containing a certain mercury compound known commercially as "Nuodex Super-Ad-It", after said defendant E. & F. King & Co., Incorporated, had expressly warranted said paint to be suitable for use in greenhouses in which roses were grown, and had further expressly warranted that said paint could be used in such greenhouses without harm to the growth of roses; plaintiff Arnold-Fisher Company relied upon said express warranties, and used said paint in its greenhouses in which roses were grown; said paint in fact gave off a mercury vapor which was harmful to the growth of roses, and was therefore unsuitable for use in greenhouses; within a reasonable time after plaintiff Arnold-Fisher Company knew or ought to have known of the breach of said express warranties it gave due notice thereof

to defendant E. & F. King & Co., Incorporated; as the result of the breach of said express warranties, many thousands of the plaintiff's rose bushes were killed, and the production of roses was greatly diminished, thereby resulting in great loss of profits, and necessitating the expenditure of great sums of money to eliminate the effects of said mercury vapor and for the replacement of its rose bushes, all to its great damage.

Count IV. Plaintiff Arnold-Fisher Company is engaged in the business of operating greenhouses for the growing of roses and the commercial sale thereof; defendant E. & F. King & Co., Incorporated, was a manufacturer and retailer of industrial paints; plaintiff Arnold-Fisher Company purchased from said defendant E. & F. King & Co., Incorporated, in 1954 a certain paint containing a certain mercury compound, known commercially as "Nuodex Super-Ad-It", after having made known to said defendant E. & F. King & Co., Incorporated, that said paint was desired for use in the painting of greenhouse interiors; plaintiff Arnold-Fisher Company relied upon the skill and judgment of said defendant E. & F. King & Co., Incorporated, and used said paint in its greenhouses in which roses were grown; said paint in fact gave off a mercury vapor, which was harmful to the growth of roses, and was therefore not reasonably fit for use in greenhouses; within a reasonable time after plaintiff Arnold-Fisher Company knew or ought to have known of the breach of said implied warranty it gave due notice thereof to defendant E. & F. King & Co., Incorporated; as the result of the breach of said implied warranty, many thousands of the plaintiff's rose bushes were killed, and the production of roses was greatly diminished, thereby resulting in great loss of profits, and necessitating the expenditure of great sums of money to eliminate the effects of said mercury vapor and for the replacement of its rose bushes, all to its great damage.

By its attorneys,

WITHINGTON, CROSS, PARK & McCANN

s/ John F. Grodey

s/ Charles E. Sennert

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
DOCKET No.

JOHNSON BROS. GREENHOUSES INC.
vs.
E. & F. KING & CO., INCORPORATED
and
NUODEX PRODUCTS CO. INC.

PLAINTIFF'S DECLARATION

COUNT 1. And the plaintiff says that it is engaged in the business of Horticulture and that it operates greenhouses for the growing of Roses, and that the defendant E. & F. King & Co., Incorporated is a manufacturer of Industrial Chemicals and Paints, and that the said plaintiff during the years 1953 and 1954 and on divers dates previous thereto purchased from the said defendant a certain paint known as No. 1104 Greenhouse White Paint. . . . .

* * * * * * * *

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX ss. SUPERIOR COURT

PEIRCE BROTHERS, INC.
vs.
E. & F. KING & CO., INCORPORATED, et al

PLAINTIFF'S DECLARATION

Count 1. And the plaintiff says that it is engaged in the business of horticulture and that it operates greenhouses for the growing of roses and that the defendants, E. & F. King & Co., Incorporated, is a manufacturer of industrial chemicals and paints and that the said plaintiff, in 1953 and 1954 and on diverse dates previous thereto purchased from the said defendant a certain paint known as #1104 Greenhouse White Paint. . . .

* * * * * * * *

ORDER ON DEFENDANT NUODEX PRODUCTS CO., INC.'S OFFER OF EXHIBITS

(December 22, 1955)

The offer of Nuodex Products Co., Inc., consisting of four photostatic copies of writs and declarations pending in the Superior Court of the Commonwealth of Massachusetts in the actions Johnson Brothers Green-Houses, Inc. v. E. & F. King & Co., Incorporated and Nuodex Products Co., Inc.; E. & F. King & Co. v. Nuodex Products Co., Inc.; Peirce Brothers, Inc. v. E. & F. King & Co., Inc. and Nuodex Products Co., Inc.; and Arnold-Fisher Company v. E. & F. King & Co., Inc. and Nuodex Products Co., Inc., is rejected.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

W. H. ELLIOTT & SONS CO., INC.

Plaintiff-Appellant

vs.

NUODEX PRODUCTS CO., INC.

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

RECORD APPENDIX TO BRIEF FOR THE APPELLANT

Submitted by

STANLEY M. BROWN, and

McLANE, CARLETON, GRAF, GREENE & BROWN

Attorneys for Appellant

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No. 5125

W. H. ELLIOTT & SONS CO., INC.
Plaintiff Appellant

vs.

NUODEX PRODUCTS CO., INC.
Appellee

RECORD APPENDIX

RELEVANT DOCKET ENTRIES

1954

Oct. 25 Complaint and demand for jury trial.
Summons issued.
Marshal's return on service of summons on October 25, 1954.

Nov. 13 Appearance for defendant, E. & F. King Co., Inc., Upton Sanders & Upton, John H. Sanders, Esq.
Motion of defendant, E. & F. King Co., Inc., for extension of time in which to file answer.
Appearance for defendant Nuodex Products Co., Inc., Sullowav, Jones, Hollis & Godfrey, Frank J. Sullowav, Esq.
Motion of defendant Nuodex Products Co., Inc., to dismiss.

Nov. 18 Motion of plaintiff for an order granting plaintiff leave to take oral depositions.

1955

Feb. 28 Hearing is had on plaintiff's motion to take depositions. Taken under advisement. Connor, J.
Hearing is had on Par. 1 of defi. Nuodex' motion to dismiss.
Under advisement.
Defendant King's motion to extend time to answer is postponed.

Mar. 1 Reporter's transcript of Argument of Mr. Joseph S. Ransmeier on defendant Nuodex' Motion to Dismiss.

Mar. 4 Plaintiff's Memorandum Opposing Defendant's Motion to Dismiss.

Mar. 4 Memorandum of Law in support of defendant Nuodex Products Co., Inc.'s Motion to Dismiss the Complaint as to it for failure to state a claim upon which relief can be granted.

Mar. 29 On motion of defendant, Nuodex Products Co., Inc., to dismiss, the following Order "So much of the defendant Nuodex Products Co.'s motion as relates to dismissal of the action because the complaint fails to state a claim upon which relief can be granted, is denied. The remainder of the motion has not yet been heard." Connor, J.

Mar. 29 On plaintiff's motion for order granting plaintiff leave to take oral depositions, the following order: "It not appearing that an order is required, the motion is denied." Connor, J.

Oct. 20 Answer of defendant, E. & F. King & Co., Inc.
Cross Claim of defendant, E. & F. King & Co., Inc.

Oct. 21 Motion of defendant Nuodex Products Co., Inc., to Dismiss Cross-Claim of E. & F. King & Co., Inc., and Certificate of Service.

Oct. 26 Hearing is had on question of jurisdiction and continues throughout the day.

Oct. 27 Hearing on question of jurisdiction is resumed and continues throughout the day.

Oct. 28 Hearing on question of jurisdiction is resumed and continues throughout the day.

Oct. 31 Hearing on question of jurisdiction is resumed and continues throughout the day. Plaintiff's oral evidence is closed.
Depositions to be taken later on agreement of the parties.
Defendant King's oral evidence is closed.
Hearing continued sine die. Connor, J.

Nov. 28 Hearing is had on question pertaining to deposition. Taken under advisement. Order forthwith. Connor, J.
Deposition of Charles J. Gotthardt.

Dec. 1 Order, Connor, J., that deponent, Charles J. Gotthardt is not required to answer question submitted.

Dec. 2 Reporter's Hearing on Question of Jurisdiction (4 Vols.)

Dec. 2 Motion of defendant Nuodex Products Co., Inc., that deposition of Gotthardt be not closed.

Dec. 5 Hearing is had on above motion. "Counsel does not desire to press. A. J. C."

Dec. 12 Deposition of Cornelius Zabriski.

Dec. 22 Order, Connor, J., rejecting offer of exhibits by defendant Nuodex Products Co., Inc.

Dec. 27 Plaintiff's Brief in Opposition to Defendant Nuodex' Motion to Dismiss for Lack of Jurisdiction, together with Factual Memorandum in Support of Plaintiff's Brief.

1956

Jan. 3 Brief of defendant Nuodex Products Co., Inc., in support of its motion to dismiss the complaint as to it for want of jurisdiction.

Memorandum of E. & F. King & Co., Inc., in opposition to motion of Nuodex to Dismiss, and Certificate of Service.

Request of E. & F. King & Co., Inc., for Findings and Rulings.

Jan. 5 Table of Contents and Table of Authorities for use in connection with Brief of Nuodex Products Co., Inc.

Apr. 18 Opinion, Connor, J., finding Nuodex not being subject to service within this district, the return must be quashed and action dismissed.

Apr. 18 Order, Connor, J., in conformity with opinion, quashing return as to Nuodex Products Co., Inc., and dismissing action.

Apr. 25 Plaintiff's Notice of Appeal from order of April 18, 1956, and Certificate of Service.

Apr. 26 Motion of defendant E. & F. King & Co., Inc., to amend and supplement findings of fact.

May 2 Answer of defendant Nuodex Products Co., Inc., to motion of defendant King Company to amend and supplement findings of fact.

May 22 Hearing is had on motion of defendant, E. & F. King & Co., Inc., to amend and supplement findings of fact. Taken under advisement. Connor, J.

May 31 Above motion denied. Connor, J.
Record certified to Circuit Court of Appeals.

COMPLAINT

(Caption Omitted)

Now comes W. H. Elliott & Sons Co., Inc., plaintiff, and complaining of E. & F. King & Co., Incorporated, and Nuodex Products Co., Inc., defendants, as and for its cause of action, says:

1. Jurisdiction is founded on diversity of citizenship under 28 U. S. C. A. *s.* 1332. W. H. Elliott & Sons Co., Inc., plaintiff herein, is a New Hampshire corporation with principal place of business in Madbury, in the State of New Hampshire, in this District, the defendant E. & F. King & Co., Incorporated is a Massachusetts corporation with principal place of business at 640 Pleasant Street, Norwood, Commonwealth of Massachusetts; the defendant Nuodex Products Co., Inc., is a New York corporation with principal place of business at 1 Virginia Avenue, Newark, State of New Jersey. The amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars, being Three Hundred Thousand Dollars ($300,000).

2. The defendant King Company, being a foreign corporation, was, before, on, and after June 8, 1954, and now is transacting business in this state but failed to appoint a registered agent upon whom service of legal process may be had, and thereby the Secretary of State of the State of New Hampshire is irrevocably authorized as the agent and representative of such foreign corporation to accept service of process under Section 4 of Chapter 206 Revised Laws of New Hampshire as amended by Chapter 206, Session Laws of 1949.

3. The defendant Nuodex Company, being a foreign corporation, was, before, on, and after June 8, 1954, and now is transacting business in this state but failed to appoint a registered agent upon whom service of legal process may be had, and thereby the Secretary of State of the State of New Hampshire is irrevocably authorized as the agent and representative of such foreign corporation to accept service of process under Section 4 of Chapter 206 Revised Laws of New Hampshire as amended by Chapter 206, Session Laws of 1949.

Count I

4. Plaintiff on June 8, 1954 and for a long time prior thereto was, and was known to the defendants as, a cultivator of roses operating commercial greenhouses in Madbury, New Hampshire and selling its roses in New England and New York markets.

5. The defendant King Company is and for many years has been a manufacturer of paint, including No. 1004 Greenhouse White paint for use inside of greenhouses, and knew, or in the exercise of reasonable care should have known, that mercury vapor is injurious to plants and particularly to roses and that paint which contained ingredients which were capable of radiating such vapors is not fit and proper for use inside greenhouses, and it was the duty of this defendant not to sell to the public, including the plaintiff, paint which contained such unstable mercuric materials.

6. The defendant Nuodex Company is and for many years, directly and through subsidiaries, has been a manufacturer of fungicides, including a fungicidal material for greenhouse paints known as "Super-Ad-it," and knew, or in the exercise of reasonable care should have known, that mercury vapor is injurious to plants and particularly to roses and that fungicides which include ingrediants which, when mixed with greenhouse paint, are capable of radiating such vapors are not fit and proper for use in paint sold for use inside greenhouses, and it was the duty of this defendant not to sell fungicides to the public or to others for inclusion in products to be sold for use in greenhouses to the public, including this plaintiff, when in such combinations unstable mercuric materials would be produced.

7. Nevertheless, the defendant Nuodex manufactured "Super-Ad-it" and sold the same as and for a fungicide safe and proper for addition to greenhouse paint, and knew, or in the exercise of due care should have known that "Super-Ad-it" contained mercury in an unstable form when combined with such paint and applied inside greenhouses, which would cause injury to plants, including rose bushes, in the greenhouse where the paint was used, to the damage of purchasers of the paint containing the fungicide, including the plaintiff.

8. The defendant King Company negligently added "Super-Ad-it" to its No. 1004 Greenhouse White paint, either knowing that the fungicide contained unstable mercury which would cause injury to plants in greenhouses in which the paint was used, or having insufficient knowledge of the characteristics of the additive and failing to ascertain whether it would cause such injury; and negligently failed to ascertain that when the "Super-Ad-it" was mixed with its No. 1004 Greenhouse White paint and applied within greenhouses, the mercury would become volatile and

mercury vapors would be radiated to the injury of plants in the greenhouses and to the damage of the purchasers of the paint, including the plaintiff.

9. Plaintiff purchased 250 gallons of No. 1004 Greenhouse White paint from the defendant King Company between June 8 and August 13, 1954 which paint was manufactured by said defendant King Company, and contained "Super-Ad-it" manufactured by the defendant Nuodex Products Company, and applied the paint inside of two greenhouses in Madbury, in the exercise of due care, and thereafter, as a result of applying said paint inside the said greenhouses, the growth of seventy thousand (70,000) rose bushes was inhibited, interfered with, and permanently impaired in a manner which reduced the production of roses on said bushes both in quantity and in quality to an extent that plaintiff's cultivation of said roses is conducted at a loss, and contaminated the soil in which said plants are cultivated, thereby (1) destroying the value of said plants, (2) requiring their replacement, (3) destroying the value of the soil and requiring its replacement, (4) depriving plaintiff of the usual production of roses from said seventy thousand (70,000) bushes until replaced and until the replacement rose bushes are capable of commercial production, and (5) rendered plaintiff incapable of furnishing satisfactory roses to all of its customers thereby injuring plaintiff's business reputation which damage continues and in the future will continue.

WHEREFORE plaintiff demands judgment against the defendants in the sum of Three Hundred Thousand Dollars ($300,000) and costs.

COUNT II

10. Paragraphs 1, 2, 3, 4, and 5 are made part of this Count by reference.

11. On various dates between June 8 and August 13, 1954, plaintiff purchased from the defendant King Company five lots of ten five-gallon cans each of No. 1004 Greenhouse White paint, the purchases totalling 250 gallons of said paint.

12. The defendant King Company expressly and by implication warranted to the plaintiff Elliott Company that the said No. 1004 Greenhouse White paint and its ingredients were safe, fit, and proper for use inside plaintiff's greenhouses in which plaintiff cultivates roses for commercial purposes and that said paint

could be so used without damage to the rose bushes or roses cultivated therein and without inhibiting future growth of said plants.

13. Defendant Nuodex Products Company, prior to June 8, 1954, had expressly and by implication warranted to the defendant King Company, for the benefit of purchasers of King Company's paints, including this plaintiff, that a certain fungicide manufactured by Nuodex and known as "Super-Ad-it" was a fit and proper ingredient to be added to paint to be sold for use inside greenhouses such as those of plaintiff in which said paint was used and would be beneficial to said users of said paint.

14. The defendant King Company, prior to shipment of the said No. 1004 Greenhouse White paint to the plaintiff, and unknown to the plaintiff, added "Super-Ad-it" to said paint which plaintiff alleges, on information and belief, contained substances which were capable of releasing noxious fumes or vapors including mercury vapors.

15. Plaintiff, relying on the skill and judgment of the defendant King Company and its said warranties of the fitness of the said No. 1004 Greenhouse White paint, on divers dates between June 11 and September 4, 1954, in the exercise of due care, did use and apply said paint to the interior of two certain greenhouses located in Madbury in said county and State of New Hampshire in which thousands of rose bushes were in cultivation.

16. Thereafter, as a result of applying said paint inside the said greenhouses, the growth of some seventy thousand (70,000) rose bushes was inhibited, interfered with; and permanently impaired in a manner which reduces the production of roses on said bushes, both quantitatively and qualitatively, to an extent that plaintiff's cultivation of said rose bushes is conducted at a loss, and requires the replacement of said rose bushes, and the soil in which they are cultivated.

17. Plaintiff alleges, on information and belief, that the damage to the said rose bushes is caused by the emission from the said paint of vapors including mercury vapor from which noxious substances are absorbed by the susceptible rose bushes and are retained in the said plants thereafter; that the source of the said vapors is the fungicide, manufactured by the defendant Nuodex Company and added to the paint of the defendant King Company by that Company.

18. The unsuitability of the paint for use within the greenhouses was not such as ought to have been revealed by an examination of the same by the plaintiff, and no warning of the mercuric ingredients was given by the defendants to plaintiff.

19. Replacement of said rose bushes is not feasible or possible, because of the requirements of their cultivation and culture, prior to January of 1955, and commercial production from new rose bushes if transplanted in January cannot be anticipated prior to April of 1955.

20. Plaintiff's cost of operating its greenhouses continues and will continue until April, 1955, as before the sustaining of said damage and is not affected by the damage, since the greenhouses must still be maintained and heated, and the plants cultivated even though not producing.

21. The loss of the production of the said seventy thousand (70,000) rose bushes constitutes a loss of nearly one-third plaintiff's rose production, renders plaintiff unable to supply roses to many present accounts, and causes and will in the future cause damage to plaintiff's business through the loss of accounts and damage to plaintiff's business reputation.

WHEREFORE, plaintiff demands judgment against the said defendants in the sum of Three Hundred Thousand Dollars ($300,000), together with the costs of this action.

W. H. Elliott & Son Co., Inc.
By Stanley M. Brown and
McLane, Carleton, Graf, Greene & Brown
By Stanley M. Brown
Plaintiff's Attorney
40 Stark St., Manchester, N. H.

Plaintiff desires and demands a jury trial.

W. H. Elliott & Son Co., Inc.
By Stanley M. Brown and
McLane, Carleton, Graf, Greene & Brown
By Stanley M. Brown
Its Attorney
40 Stark St., Manchester, N. H.

MOTION TO DISMISS

(Caption Omitted)

Now comes the defendant Nuodex Products Co., Inc., and moves the Court as follows:

(1) To dismiss the action because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc., upon which relief can be granted.

(2) To dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant Nuodex Products Co., Inc., is a corporation organized under the laws of the State of New York, which has never done business within The State of New Hampshire, and was not and is not subject to service of process within the District of New Hampshire.

NUODEX PRODUCTS CO., INC.
By SULLOWAY, JONES, HOLLIS & GODFREY
Its Attorneys

November 12, 1954

ORDER OF MARCH 29, 1955

"So much of the defendant Nuodex Products Co.'s motion as relates to dismissal of the action because the complaint fails to state a claim upon which relief can be granted; is denied. The remainder of the motion has not yet been heard." Connor, J.

ANSWER OF E. & F. KING & CO., INCORPORATED

(Caption Omitted)

Now comes E. & F. King & Co., Incorporated, defendant in the above-entitled complaint, and for answer says:

1. It admits the jurisdictional allegations of paragraph 1 of said complaint.

2. It admits the allegations of paragraph 2 of said complaint.

3. It admits the allegations of paragraph 3 of said complaint.

COUNT I

4. It admits that on June 8, 1954 and prior thereto the said plaintiff was known to this defendant as the operator of commercial greenhouses. It denies the remaining allegations of paragraph 4 of said complaint.

5. It admits that it is and for many years has been a manufacturer of paint, including No. 1004 Greenhouse White paint

for use in painting greenhouses. It denies the remaining allegations of paragraph 5 of said complaint.

6. The matters alleged in paragraph 6 of said complaint do not pertain to any claim asserted by the plaintiff against this defendant, and no answer thereto is required.

7. The matters alleged in paragraph 7 of said complaint do not pertain to any claim asserted by the plaintiff against this defendant.

8. It denies the allegations of paragraph 8 of said complaint.

9. It admits that the plaintiff purchased 250 gallons of No. 1004 Greenhouse White paint from the defendant King Company between June 8 and August 13, 1954, which paint was manufactured by King Company and contained "Super-Ad-it" manufactured by the defendant Nuodex Products Company. It is without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff applied the paint inside two greenhouses in Madbury in the exercise of due care. It denies the remaining allegations of paragraph 9 of said complaint.

COUNT II

10. It reiterates its answer to paragraphs 1, 2, 3, 4, and 5 and incorporates the same herein by reference in answer to paragraph 10 of said complaint.

11. It admits the allegations of paragraph 11 of said complaint.

12. It denies the allegations of paragraph 12 of said complaint.

13. It admits the allegations of paragraph 13 of said complaint.

14. It admits that prior to shipment to the plaintiff by the defendant of the said paint "Super-Ad-it" was added to said paint by this defendant. It is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 14 of said complaint.

15. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of said complaint.

16. It denies the allegations of paragraph 16 of said complaint.

17. It denies the allegations of paragraph 17 of said complaint.

18. It denies the allegations of paragraph 18 of said complaint.

19. It denies that the plaintiff has been damaged as alleged in paragraph 19 of said complaint.

20. It denies that the plaintiff has been damaged as alleged in paragraph 20 of said complaint.

21. It denies that the plaintiff has been damaged as alleged in paragraph 21 of said complaint.

WHEREFORE the said defendant E. & F. King & Co., Incorporated, prays that said complaint may be dismissed and for its costs.

E. & F. KING & CO., INCORPORATED
By its Attorneys
UPTON, SANDERS & UPTON

CROSS-CLAIM

(Caption Omitted)

Now comes E. & F. King & Co., Incorporated, hereinafter referred to as King Company, and, pursuant to the provisions of Rule 13 (g) of Civil Procedure, in cross-claim against the defendant Nuodex Products Co., Inc., hereinafter referred to as Nuodex, says:

1. The defendant King Company is a corporation duly organized under the laws of the Commonwealth of Massachusetts and is now and has been doing or transacting business in the State of New Hampshire. The defendant Nuodex is a corporation duly organized under the laws of the State of New York and is now and has been doing or transacting business in the State of New Hampshire. The plaintiff is a corporation duly organized under the laws of the State of New Hampshire and has its principal place of business in said State.

The defendant Nuodex on or about November 12, 1954 by motion filed herein moved: "1. To dismiss the action because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc., upon which relief can be granted" and "2. To dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant Nuodex Products Co., Inc., is a corporation organized under the laws of the State of New York, which has never done business within the State of New Hampshire, and was not and is not subject to service of process within the District of New Hampshire". Thereafter the defendant Nuodex brought forward for hearing its motion to dismiss because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc., upon which relief can be granted, and the Court, after hearing the plaintiff and Nuodex therein both orally and by written argument on

March 29, 1955 denied said motion, as appears by the order entered herein.

Nuodex, by invoking the judgment of this Court as to whether the plaintiff's complaint stated a claim upon which relief could be granted against it, waived all jurisdictional questions and thereby submitted itself to the jurisdiction of the Unted States District Court for the District of New Hampshire to determine each and every issue raised by the allegations of said complaint and of this cross claim.

2. King Company is now and for a long time has been engaged in manufacturing and selling paints, including paints to be applied to the interiors and exteriors of greenhouses. Nuodex is now and for a long time has been engaged in manufacturing and selling fungicides, particularly including a compound called "Super-Ad-it", for addition to or use in paints including greenhouse paints.

COUNT I

3. In consideration that the King Company at the request of Nuodex, its agents and servants, would purchase of Nuodex a certain ingredient or fungicide known as "Super-Ad-it", Nuodex expressly promised and warranted that "Super-Ad-it" was a desirable and harmless ingredient or fungicide suitable and fit to be added to or used in all paints being made or manufactured by King Company, including paints being so manufactured and sold for the painting of greenhouses, and without limiting the generality of the foregoing, expressly promised and warranted that "Super-Ad-it" was stable, nonvolatile, nontoxic, nonreactive when used in paint, and would provide fungicidal effectiveness without affecting the properties and stability of any paint.

4. In reliance upon said promises and warranties of Nuodex, King Company at various times purchased sundry lots or quantities of "Super-Ad-it" from and paid Nuodex therefor. In further reliance upon said promises and warranties, King Company added "Super-Ad-it" to or used it in various paints being manufactured by it, including its so-called "No. 1004 Greenhouse White Paint".

5. Between June 9, 1954 and August 16, 1954 King Company sold and delivered to the plaintiff five lots of 50 gallons each of said greenhouse paint with "Super-Ad-it" added thereto or used therein.

6. The plaintiff in this action claims that "Super-Ad-it" con

tained mercury which, after application of said paint to the plaintiff's greenhouses, vaporized or otherwise acted or reacted in such manner as to injure rose bushes or roses being grown by the plaintiff in its greenhouses, causing substantial damage to the plaintiff, as more particularly appears in said complaint.

7. If the plaintiff suffered injury or damage for the reasons and in the manner alleged, all of which is denied by King Company as appears by its answer to said complaint, "Super-Ad-it", contrary to the aforesaid promises and warranties by Nuodex to King Company, was not desirable and harmless, was not suitable and fit to be added to said greenhouse paint, but in fact was unstable, volatile, toxic, and reactive when used in said paint, and harmfully affected the properties and stability of said paint. King Company seasonably and duly notified Nuodex that if the plaintiff had in fact suffered injury or damage for the reasons and in the manner alleged by it, such injury or damage had resulted from or been caused by the breach by Nuodex of its aforesaid promises and warranties.

8. If King Company is found liable to the plaintiff in damages, King Company, as a consequence of the breach of said promises and warranties by Nuodex, is entitled to recover against Nuodex the amount of such damages together with all expenses incurred by it in defending against the claim of the plaintiff.

COUNT II

9. At various times King Company purchased sundry lots or quantities of "Super-Ad-it" from and paid Nuodex therefor and in making said purchases informed Nuodex that it required "Super-Ad-it" for addition to or use in paints being manufactured and sold by King Company, including its greenhouse paint. Each purchase of "Super Ad-it" from Nuodex was made in reliance by King Company upon the skill or judgment of Nuodex that "Super-Ad-it" was reasonably fit for addition to or use in the aforesaid paints, and thereby in so selling "Super-Ad-it" to King Company, Nuodex impliedly warranted to King Company that "Super-Ad-it" was reasonably fit for the particular purpose for which King Company had informed Nuodex it required "Super-Ad-it".

10. Thereafter and in further reliance upon said implied warranty, King Company added "Super-Ad-it" to or used it in various paints being manufactured and sold by it, including said green-

house paint. Between June 9, 1954 and August 16, 1954 King Company sold and delivered to the plaintiff five lots of fifty gallons each of said greenhouse paint containing "Super-Ad-it".

11. The plaintiff in this action claims that "Super-Ad-it" contained mercury, which, after application of said paint to plaintiff's greenhouses vaporized or otherwise acted or reacted in such manner as to injure rosebushes or roses being grown by the plaintiff in its greenhouses, causing substantial damage to the plaintiff as more particularly appears in said complaint.

12. If the plaintiff suffered injury or damage for the reasons and in the manner alleged, all of which is denied by King Company as appears by its answer to said complaint, "Super-Ad-it", contrary to the implied warranty by Nuodex that it was reasonably fit for addition to or use in said greenhouse paint, was not suitable and fit to be so added or used and because of its unfitness for such use, harmfully affected the properties and stability of said paint. King Company seasonably and duly notified Nuodex that if the plaintiff had in fact suffered injury or damage for the reasons and in the manner alleged by it, such injury or damage had resulted from or been caused by the breach by Nuodex of its aforesaid implied warranty.

13. If King Company is found liable to the plaintiff in damages, King Company, as a consequence of the breach by Nuodex of said implied warranty, is entitled to recover against Nuodex the amount of such damages together with all expenses incurred by it in defending against the claim of the plaintiff.

COUNT III

14. At various times previous to August 16, 1954 Nuodex represented to King Company that "Super-Ad-it" was a desirable and harmless ingredient or fungicide and fit to be added to or used in all paints being manufactured and sold by King Company, including its greenhouse paint, and without limiting the generality of the foregoing Nuodex represented that "Super-Ad-it" was suitable, nonvolatile, nontoxic, and nonreactive when used with any paint being manufactured and sold by King Company, that "Super-Ad-it" would provide fungicidal effectiveness without affecting the properties and stability of said paint, and without any warning that it was unsuitable and unfit for addition to or use in greenhouse paint. In reliance upon said representations King Company at various times purchased sundry lots or quantities of "Super-Ad-it" from and paid Nuodex therefor. In fur-

ther reliance upon said representations King Company added "Super-Ad-it" to or used it in various paints being manufactured and sold by King Company, including said greenhouse paint.

15. Between June 9, 1954 and August 16, 1954 King Company sold and delivered to the plaintiff five lots of fifty gallons each of said greenhouse paint with "Super-Ad-it" added thereto or used therein.

16. The plaintiff claims that said "Super Ad-it" contained mercury, which after application of said paint to the plaintiff's greenhouses vaporized or otherwise acted or reacted in such manner as to injure rosebushes or roses being grown by the plaintiff in its greenhouses, causing substantial damage to the plaintiff, as more particularly appears from said allegations.

17. If the plaintiff suffered injury or damage for the reasons and in the manner alleged, all of which is denied by King Company as appears by its answer to said complaint, "Super-Ad-it", contrary to the aforesaid representations by Nuodex to King Company, was not desirable and harmless, was not suitable and fit to be added to said greenhouse paint, but was unsuitable and unfit, volatile, toxic, and reactive when used in said paint and harmfully affected the properties and stability of said paint, all of which in the exercise of due and reasonable care should have been known to Nuodex, and Nuodex was careless and negligent in making the representations set forth in paragraph 14 and was further careless and negligent in selling "Super-Ad-it" to King Company without warning of such dangerous qualities or properties of "Super-Ad-it".

18. If King Company is found liable to the plaintiff in damages, King Company, as a consequence of the carelessness and negligence of Nuodex as aforesaid, is entitled to recover against Nuodex the amount of such damages, together with all expenses incurred by it in defending against the claim of the plaintiff.

WHEREFORE the said defendant, E. & F. King & Co., Incorporated, in the event it is held liable to the said plaintiff, W. H. Elliott & Sons Co., Inc., prays for judgment against the said defendant, Nuodex Products Co., Inc., in the amount of its liability to the said plaintiff together with all expenses incurred by

E. & F. King & Co., Incorporated, in defending against the said complaint, and for such other and further relief as may be just.

E. & F. KING & CO., INCORPORATED
By its Attorneys
UPTON, SANDERS & UPTON

EXHIBIT 3

NUODEX PRODUCTS IN NEW HAMPSHIRE

Reference	Date	Account	Item
	1950		
	Mar. 20	Milford Paint	Salesman Johnson visited re Nuodex dryers
	May 4	Milford Paint	Johnson visited re Nuodex dryers
	June 14	Milford Paint	Johnson visited re Nuodex dryers
	Sept. 27	Resin Research, Manchester	Johnson visited re Nuodex No. 6
	1951		
2	Jan. 5	Putnam Mfg. Co., Keene	Cobalt shipped, $78.50
(Cor 51 NH)	Jan. 20	Nashua Gummed & Coated Paper	Johnson visited
	Feb. 3	Nashua Gummed & Coated Paper	Nuodex 84 shipped $223.75
	Feb. 5	Putnam Mfg. Co., Keene	Cobalt shipped, $78.50

Reference	Date	Account	Item
	Feb. 21	Tintomatic Corp., Goffstown	Letter, Nuodex to Rhynes re business
	April 6	Nashua Gummed & Coated Paper	$223.75 order of Nuodex 84 shipped
2	May 9	Johns-Manville	Zinc and iron order shipped
11	May 10	Manchester Narrow Fabrics Milford Paint	Johnson visited and reported to Nuodex
(Cor 51 NH)	June 11	American Twine & Fabric Co., Salmon Falls	American Twine wrote Litter Co., requesting conference at Portsmouth
"	June 14	American Twine & Fabric Co.,	Conference at Portsmouth held re Nuodex products
"	June 15	American Twine & Fabric Co.,	Cookingham of Litter Co. reports to Houston of Nuodex re conference

NCE	DATE	ACCOUNT
	July 9	Nashua Gummed & Coated Paper
	Aug. 16	Milford Paint Miljo Chemical
	Aug. 20	Milford Paint
	Aug. 21	Putnam Mfg. Co.
	Aug. 27	American Twine & Fabric Co.,
	Aug. 29	American Twine & Fabric Co.,
	Aug. 30	Putnam Mfg. Co.
l NH)	Aug. 31	Milford Paint
	Oct. 22	Putnam Mfg. Co.

ITEM

Nuodex No. 84 shipped $223.75

Salesman Johnson visited re Nuodex

Salesman Johnson visited

Salesman Johnson visited re Nuodex

Test report by Nuodex on problem

Cookingham reports to Houston of Nuodex on situation

Nuodex sends free sample of Nuact Paste

Nuodex sends sample of Nuomix to Milford

Nuodex sends 4-oz. of Super-Ad-It to Putnam

Date	Account
Oct. 31	Johns Manville
Nov. 5	Putnam Mfg. Co.
Oct. 15	Milford Paint
Nov. 20	Milford Paint
1952	
Feb. 2	Resin Research
Feb. 7	Milford Paint
Feb. 13	Nashua Corporation
Feb. 26	Milford Paint

ITEM

Nuodex zinc shipped

Cobalt order shipped $51.25

Salesman Johnson visits re Nuodex

Salesman Johnson visits and reports "We will get dryer business."

Cobalt order shipped $41.50

Exkin order shipped $45.50

Nuodex No. 84 order shipped $213.75

Salesman Johnson visits re Nuodex

Date	Account
Feb. 26	New Englant Paint Works, Goffstown
Feb. 26	New Englant Paint Works
Feb. 26	Nashua Gummed & Coated Paper
Feb. 29	Nashua Gummed & Coated Paper
Mar. 12	Putnam Mfg. Co.
May 27	Johns-Manville
June 4	Milford Paint
June 11	Milford Paint
June 18	Milford Paint

ITEM

Salesman Johnson visits re Nuodex

Salesman Johnson visits

Salesman Johnson visits re Nuodex

One quart cobalt sample sent by Nuodex, on Johnson's request

Manganese order shipped $29.00

Zinc order shipped

Nuodex Lead order shipped $106.88

Salesman Johnson visits re Nuodex

Nuodex Paste shipped $30.84

Reference	Date	Account	Item
	June 19	Johns-Manville	Zinc order shipped
	July 10	Milford Paint	Salesman Johnson visits
	July 26	Nashua Corporation	Johnson writes that Nuodex samples will be sent
	July 28	Milford Paint	Cobalt order shipped $183.83
	Aug. 11	New England Paint	Free sample of Nuodex product sent to Goffstown
	Aug. 20	Milford Paint	Salesman Johnson visits re Nuodex
	Aug. 29	New England Paint	Nuodex sends free sample of product

Reference	Date	Account	Item
	Sept. 10	Nashua Corporation	Nuodex No. 94 order shipped $427.50
	Oct. 13	Milford Paint	Lead order shipped $106.88
	Oct. 24	H & H Chemical, Epping, N. H.	Houston of Nuodex writes Haugh thanking him for order
	Oct. 27	H & H Chemical	Order of Super-Ad-It shipped $15.00
	Nov. 19	Johns-Manville	Zinc order shipped
	1953		
D.P. 90	Feb. 10	Nashua Corporation	Johnson visited re Nuodex 84
D.P. 90		Milford Paint	Johnson visited re Super-Ad-It Nuodex dryers

Reference	Date	Account	Item
D.P. 91		International Shoe	Johnson visited
D.P. 92		Hermsdorf Fixtures	Johnson visited
D.P. 93		New England Paint, Goffstown	Johnson visited re Nuodex dryers
	Feb. 17	F. A. Putnam Mfg. Co.	Cobalt and Manganese shipped $29.00
D.P. 89	Mar. 9	F. A. Putnam Mfg. Co.	Nuact paste, Johnson visited
	Mar. 20	Johns-Manville	Zinc and Nuodex Iron shipped
D.P. 88	Mar. 26	Nashua Corporation	Johnson visited Re Nuodex 84
D.P. 89		Milford Paint	Johnson visited re Nuodex dryers Super-Ad-It
	Apr. 1	Resin Research	Cobalt Order shipped
D.P. 86, 87	Apr. 8	Great Falls Bleachery	Cookingham and Galbraith re Nuodex 100

Reference	Date	Account	Item
	Apr. 10	Great Falls Bleachery	Nuodex No. 100 WD order shipped
	Apr. 17	Resin Research	Cobalt order shipped $56.75
	Apr. 20	Nashua Corporation	Nuodex No. 84 order shipped $213.75
	May 19	Great Falls Bleachery	Nuodex No. 100 WD order shipped
D.P. 84 85	May 28	Nashua Corporation	Johnson visited
D.P. 82	June 3	Miljo Chemical	Johnson visited
		General Electric	Johnson visited
		Great Falls Bleachery	Johnson visited re Nuodex 100
D.P. 81	July 7	F. A. Putnam Mfg. Co. Keene	Johnson visited re Nuodex Zirconium
	July 15	F. A. Putnam Mfg. Co.	Cobalt and Manganese shipped $80.75

Reference	Date	Account	Item
	July 17	F. A. Putnam Mfg. Co.	Free sample of Nuodex products shipped
D.P. 78	Aug. 13	Nashua Corporation	Johnson visited re Nuodex 84
D.P. 78		Milford Paint	Johnson visited re Nuodex cobalt
D.P. 80		International Shoe	Johnson visited
D.P. 81		Hermsdorf Fixtures Manchester	Johnson visited
D.P. 75	Aug. 31	Miljo Chemical	Johnson visited
D.P. 75		General Electric	Johnson visited
D.P. 76		Great Falls Bleachery	Johnson visited re Nuodex 100 WD
D.P. 73	Sept. 22	Nashua Corporation	Johnson visited re Nuodex 84
D.P. 74		Milford Paint	Johnson visited re Nuodex dryers
D.P. 75		International Shoe	Johnson visited re Vinyl Stabilizers

Reference	Date	Account	Item
	Oct. 1	F. A. Putnam Mfg. Co.	1 gallon of Super-Ad-It shipped $15.52
D.P. 72	Nov. 10	Nashua Corporation	Johnson visited
		International Shoe	Johnson visited
D.P. 73		Milford Paint	Johnson visited re Nuodex dryers
	Nov. 15	Simplex Wire & Cable Co., Portsmouth, N. H.	Nuodex No. 209 order shipped $292.40
D.P. 71	Nov. 30	Milford Paint	Johnson makes a phone call re bill
	Dec. 7	Great Falls Bleachery	Nuodex 100 WD order shipped
D.P. 69	Dec. 16	Nashua Corporation	Johnson visited
D.P. 70		Milford Paint	Johnson visited re Nuodex dryers
	Dec. 28	Great Falls Bleachery	Nuodex 100 WD order shipped

Reference	Date	Account	Item
	1954		
	Jan. 15	Great Falls Bleachery	Order of Nuodex 100 WD shipped
	Jan. 20	Johns-Manville	Nuodex zinc order shipped
	Feb. 1	Resin Research	Order of cobalt shipped
	Mar. 18	Simplex Wire & Cable	Order of Nuodex 209 shipped $292.40
	Apr. 19	Great Falls Bleachery	Nuodex 100 WD shipped
	May 4	Resin Research	Three free samples sent
	May 19	Great Falls Bleachery	Nuodex 100 WD shipped
	June 3	F. A. Putnam Mfg. Co.	Order of Nuodex Cobalt shipped
	June 8	Johns-Manville	Nuodex zinc shipped

Reference	Date	Account	Item
	June 11	Great Falls Bleachery	Nuodex 100 WD shipped
	June 28	Great Falls Bleachery	Nuodex 100 WD shipped
D.P. 67, 68	July 13	Milford Paint	Johnson visited re Nuodex dryers
		Miljo Chemical	Johnson visited
		F. A. Putnam Mfg. Co.	Johnson visited re
		Keene	Nuodex dryer
			Nuosperse
	July 14	Great Falls Bleachery	Nuodex 100 WD shipped
	July 19	Johns-Manville	Nuodex zinc shipped
	July 23	Resin Research	Nuodex cobalt order shipped
	Aug. 27	Simplex Wire & Cable	Nuodex 209 shipped
	Sept. 7	Resin Research	Two free samples of Nuodex products shipped

Reference	Date	Account	Item
	Sept. 16	Nashua Corporation	Free sample of cyclodex shipped
D.P. 65	Sept. 22	New England Chemical	Johnson visited
D.P. 66		Milford Paint	Johnson visited re Super-Ad-It
	Sept. 28	Great Falls Bleachery	Nuodex 100 WD shipped
D.P. 62, 63	Oct. 5	General Electric, Somersworth	Johnson visited
D.P. 64		Great Falls Bleachery	Johnson visited re Nuodex 100
D.P. 65		Miljo Chemical	Johnson visited re Nuosperse
	Oct. 6	Great Falls Bleachery	Nuodex 100 WD shipped
	Oct. 13	Great Falls Bleachery	Nuodex 100 WD shipped
D.P. 59	Nov. 1	Nashua Corporation	Johnson visited re Nuostaves

Reference	Date	Account	Item
D.P. 60		International Shoe Manchester	Johnson visited re Nuostaves
D. P. 59		New England Cable Concord	Johnson visited re Nuostaves Vinyl Stabilizers
	Nov. 10	Great Falls Bleachery	Nuodex 100 WD shipped
	Nov. 29	Great Falls Bleachery	Nuodex 100 WD shipped
(Misc.)	Dec. 30	Great Falls Bleachery	Salesman Johnson visits Somersworth plant
	1955 Jan. 3	Great Falls Bleachery	4 doz. Nuophene samples shipped
D.P. 52	Jan. 4	Great Falls Bleachery	Johnson visited re Nuophene, Nuodex 100
D.P. 55		General Electric Somersworth	Johnson visited

Reference	Date	Account	Item
D.P. 56		Miljo Chemical Exeter	Johnson visited re Nuosperse
D.P. 45	Jan. 12	Nashua Corporation	Johnson visited re Nuodex 84
D.P. 46	Jan. 12	New England Chemical Supply	Johnson visited
D.P. 47		Milford Paint	Johnson visited re Nuolate dryers
D.P. 50		Hampshire Manufacturing	Johnson visited re Vinyl stabilizers
	Jan. 18	Nashua Corporation	Nuodex 84 shipped $213.75
	Jan. 27	Resin Research	Cobalt order shipped $47.75
	Feb. 10	Great Falls Bleachery	Nuodex 100 WD shipped
	Feb. 28	F. A. Putnam Mfg. Co.	Nuodex cobalt shipped $31.00
	Mar. 9	Great Falls Bleachery	Nuodex 100 WD shipped

Reference	Date	Account	Item
	May 4	Resin Research	Nuodex cobalt shipped $47.75
D.P. 40, 117	Mar. 17	Simplex Wire & Cable	Johnson visited re Nuodex wetting agent
"		General Electric	Johnson visited
"		Great Falls Bleachery	Johnson visited re Nuodex 100

DEPOSITION OF CHARLES J. GOTTHARDT

(Caption Omitted)

Deposition taken by agreement of the parties at the request of the Defendant King Company at the offices of Upton, Sanders & Upton, 14 Park Street, Concord, New Hampshire at 11:45 a.m., November 22, 1955.

It is agreed that the deposition may be taken in the first instance by stenotype and when transcribed may be used as the deposition of the deponent insofar as competent and material. Notice, caption, filing, and all other formalities, including signature, waived.

CHARLES J. GOTTHARDT

called as a witness in behalf of Defendant King Company, being first duly sworn by Mr. Brown, was examined and testified as follows:

Interrogatories by Mr. Sanders:

Q. What is your name? A. Charles J. Gotthardt. Q. You are how old? A. Forty-one. Q. You live where? A. Forty-nine Carey Road, Needham Heights, Massachusetts. Q. Very briefly, what was your formal education? A. Graduated from Lehigh University in 1936, doctor of science. Q. And thereafter in what types of work did you engage? A. Principally in the paint business with the initial job after graduation from college as a foreign correspondent with an importing firm in the horticultural trade. Q. In general have you been engaged in the paint business since your graduation from college? A. After the first year. Q. By whom are you presently employed? A. I am employed by the E. & F. King Company, Incorporated. Q. It has its place of business where? A. Norwood, Massachusetts. Q. Is that a Massachusetts corporation? A. Yes, it is. Q. What office do you hold in the Corporation? A. I am the vice-president of the Company. Q. Are you also a director of the Company? A. I am. Q. When did you first commence your employment with the King Company? A. March 1, 1950. Q. Have you been employed steadily since that date by this Company? A. I have. Q. And in general, just generally, what has been the nature of your duties since you commenced this employment? A. I am in charge of the entire paint operation, both manufacturing and sales. Q. Now, at some time did the King Company commence purchasing Ad-It from

Nuodex Products Company? A. Yes, it did. Q. About when did King Company commence purchasing Ad-It? A. I believe it was in the first year that I joined the Company, which would be 1950. Q. And would you just tell us about how long Ad-It was purchased by the Company from Nuodex? A. It was purchased from the time that we just referred to until the product was discontinued. Q. And the product was discontinued by Nuodex approximately when? A. In 1953, barely in 1953, I believe. Q. Through whom did King Company actually make its purchases of Ad-It? A. Well, the purchases were made through the D. H. Litter Company; purchase orders were made out to them. Q. What use, in general, did King Company make of Ad-It? A. Its sole use with King Company was for repackaging under a private label for one of its customers. Q. What was the name of that customer? A. Wilbur & Williams Company of Brighton, Massachusetts. Q. When repackaged by King Company, what use was made by Wilbur & Williams of Ad-It? A. Well, they sold it as a fungicidal additive for any and all paints, principally their own. Q. And under what name did Wilbur & Williams so sell this repackaged Ad-It? A. Sold as Fungus-ban. Q. And up until Ad-It was discontinued, as you have stated, approximately in the spring of 1953, did King Company constantly sell repackaged Ad-It to Wilbur & Williams? A. Yes. Q. And to your knowledge, whereabouts did Wilbur & Williams in turn sell this repackaged Ad-It? A. They sold it all over the United States. Q. And how about in New Hampshire? A. They had a resident salesman in New Hampshire. So obviously they were selling their products here. Q. Now, in the spring of 1953 you discontinued your repackaging of Ad-It? A. That is correct. Q. And thereafter did you purchase a successor product from Nuodex? A. We did. As soon as one was discontinued, we started with the other. Q. What was the new product? A. Super Ad-It. Q. And how long did King Company continue purchasing Super Ad-It from Nuodex after it was first sold you? A. From the spring of 1953 until September of 1954. Q. And did you; that is, King Company, repackage Super Ad-It? A. Yes, we did. Q. Tell us to what extent you did that and to whom you resold the Super Ad-It? A. Precisely the same situation occurred. Our customer was Wilbur & Williams, exclusive customer; and the amount

sold was about comparable to what had been sold prior. Q. And whereabouts was Wilbur & Williams selling the repackaged Super Ad-It? A. They were selling it through their regular outlets, once again, all over the Country. Q. And in New Hampshire? A. Yes, I believe so. Q. Now, was the repackaged Super Ad-It also sold by Wilbur & Williams under the name Fungus-ban? A. That's right. The only difference was a change in the chemical composition as indicated on the label. Q. Throughout the period you were repackaging and selling Ad-It and Super Ad-It to Wilbur & Williams did that Company have a New Hampshire agent, representative? A. Wilbur & Williams? Q. Yes. A. Yes. Q. Now, did King Company use Ad-It in any way other than in the repackaging that you have described for Wilbur & Williams? A. No. Q. Now, after you commenced, after King Company began purchasing from Nuodex Super Ad-It in the spring of 1953, did King Company make any other uses of Super Ad-It? A. Yes. We began to incorporate it in exterior paints, including greenhouse paint. Q. And did you commence that incorporation of Super Ad-It in the spring of 1953? A. Yes, experimentally at first. Q. And continued such incorporation until about when? A. Until September of 1954. Q. Now, since you have been with the Company; that is, King Company, to what extent has the Company used any other Nuodex products? A. Well, we have used great quantities of Nuodex dryers, all types of their dryers of which there are, I believe, six. We have used their anti skinning agent from the time that it came on the market, and I believe that is all we have purchased from Nuodex. Q. Now, since 1950 in what paints or other ingredients has King Company used Nuodex dryers? A. Used it in our industrial finishes, exterior paints, interior paints, and putty, certain putties. Q. In what products has King Company used the Nuodex anti skinning agent? A. In almost all of the industrial finishes that we manufacture. Q. And the use of Nuodex dryers and anti-skinning agents in the use you have described continued by King Company until about when? A. September of 1954. Q. Now, from 1950 on through whom were these Nuodex products in general purchased by King Company? A. They were always purchased from D. H. Litter. Q. Is that true regardless of what the product was? A. Yes. Q. So long as it was Nuodex? A. That's right. Q.

Now, what knowledge, if any, did Litter representatives have from 1950 to the fall of 1954 concerning the use King Company was making of Ad-It, Super Ad-It, Nuodex dryers, and Nuodex anti-skinning agents? A. In the case of Super Ad-It they knew precisely what was being done with it because they gave us instructions as to how to advise our customer to prepare his label. That also was the case with Ad-It. Insofar as Nuodex dryers and the skinning agents were concerned, they had full knowledge that they were going into paint products and putty products which we manufacture. Q. And did Litter representatives have this knowledge you have described throughout the entire period of your employment by King Company? A. Yes. Q. Now, did any Nuodex representative throughout this same period have any similar knowledge? A. Those Nuodex representatives, which called on us in conjunction with D. H. Litter certainly did. Q. What Nuodex representatives customarily called on you? A. Well, it would usually be their sales supervisor, a Frank Dwyer in particular, and his predecessor, Bill Houston. Q. Now, during the period you have been employed by King Company, has the Company had any paint and putty customers in New Hampshire? A. Yes. Q. And about how many paint and putty customers in New Hampshire during this period, 1950 to the fall of 1954, has the Company had? A. Somewhere between fifty and sixty. Q. Now, did the paint and putty being purchased by these fifty to sixty New Hampshire customers over this period contain some Nuodex product? A. Yes, with the exception of items which we did not manufacture, but only resold, including something perhaps made by the National Gypsum Company or the Coppers Company. Q. How many of these fifty to sixty paint or putty New Hampshire customers would you say were customarily regularly purchasing a King paint or putty which had a Nuodex product embodied in it? A. I would say all of them. Q. Now, after Super Ad-It was embodied in King Company paints, commencing in the spring of 1953 and up to the fall of 1954, how many of these New Hampshire customers were purchasing King Company paints which had Super Ad It embodied in them? A. About forty. Q. Can you tell me the approximate dollar volume of paint sold by King Company to New Hampshire customers during 1953 which paint had Super Ad-It embodied in it? A. That is a rather difficult question. We sold about

two thousand gallons of paint that contained Super Ad-It during that period in New Hampshire at an average selling price of about three fifty a gallon. That would be roughly $7,000. Q. That is with Super Ad-It? A. That's right. Q. Now, can you give me the approximate dollar volume of paints and putties sold by King Company in New Hampshire during the year 1953 which had a Nuodex products embodied in them? A. I believe that would be about thirty-seven thousand. I have a roster of my sales. That figure could be checked. Q. Now, could you give me the similar dollar volume for the year 1954? A. Forty-four thousand. Q. Now, could you tell us about how many gallons of King Company paint with Super Ad-It embodied therein were sold by the Company to New Hampshire customers in the year 1954? A. Approximately 2,500 gallons. Q. And in dollar volume that would represent what? A. That would represent the same formula that I used before of average selling price of $3.50 per gallon times 2,500. Q. Now, throughout the period you have been employed by King Company has the Company had any salesman or salesmen regularly seeing customers and selling King Company products in New Hampshire? A. Yes. Q. How many? A. At any one time we had one regular salesman and one specialist. In that period there were a total of three different individuals. Q. Throughout the period you have been employed by King Company have Litter Company representatives been aware that King Company was selling its paints and putty continuously and extensively in New Hampshire? A. Yes.

MR. Sanders: You may inquire, Mr. Brown, if you wish.

Interrogatories by Mr. Brown:

Q. Mr. Gotthardt, on these items, Nuodex items, who billed you for what you did buy? A. We were billed by Nuodex. Q. whom did you pay? A. Nuodex. Q. When you talk about representatives of Nuodex, you knew and know, do you not, that Litter Company employees were also representatives of Nuodex? A. Yes.

MR. SULLOWAY: Object to that as leading.

Interrogatories by Mr. Brown:

Q. In your answers to Mr. Sanders you were distinguishing between Litter people who were representing Nuodex and other representatives of Nuodex than the Litter employees?

MR. SULLOWAY: Objected to as leading.

A. I don't think I exactly understand you, Mr. Brown. I knew that D. H. Litter represented Nuodex. The people I referred to were direct-employees of Nuodex; that is, the other people I referred to as direct employees, not comparable representatives as Litter is.

Interrogatories by Mr. Brown:

Q. Employees rather than agents? A. That's right. Q. And your answer to Mr. Sanders in that sense, or was in that sense?

MR. SULLOWAY: Objected to as leading.

A. That's right.

Interrogatories by Mr. Brown:

Q. You said, in your testimony to Mr. Sanders, that you incorporated Nuodex products initially in your exterior paints, including greenhouse paints? A. Right. Q. Now, your greenhouse paint, White No. 1004, is actually a paint to be used both for exterior and interior of greenhouses? A. That's right. Q. Is that one of the paints you initially introduced this additive to? A. That is the first paint we introduced it to. Q. That was sold by your people for interiors as well as exteriors? A. That's right.

MR. BROWN: No further questions.

Interrogatories by Mr. Sulloway:

Q. Mr. Gotthardt, in connection with any sales your Company made in New Hampshire, did you ever have any representatives from the Nuodex Company present in connection with such sales?

MR. SANDERS: You mean aside from Litter Company employees?

MR. SULLOWAY: That is what I mean. I am not putting that in my question.

A. I don't believe so.

Interrogatories by Mr. Sulloway:

Q. Did you have employees of the Litter Company in New Hampshire with your agents in connection with sales there? A. Not in connection with making a sale, Mr. Sulloway, but in service work. Q. Well, when you say service, you mean by calling on the phone the Company of Litter— A. (Interrupting Counsel) No, I do not mean that. I refer particularly to an instance in Hooksett. I believe it was down in Hooksett. The stand pipe down there had been painted aluminum and was

streaking badly. We asked the D. H. Litter Company's representative, Mr. Cookingham, to come up there and look at that with us. We were interested at that time in developing a new type of paint. He, representing a pigment supplier, came along. Q. Did you understand that pigment supplier in that case was the Nuodex Company? A. No, Aluminum Company of America represented by D. H. Litter. Q. Is that the only time that you know of any employee of Litter Company coming into New Hampshire in connection with the sale of any ingredient you were selling which included Nuodex products? A. That is the only time that I have knowledge of their coming in until the Elliott situation occurred. I think they came up and looked at that. I am not sure of that. Q. You are now referring that after claim was made on account of damage—

MR. BROWN: I object to this as leading.

MR. SULLOWAY: Strike that out.

Interrogatories by Mr. Sulloway:

Q. What you are saying is that until some trouble arose about the product which you had sold, the only occasion you can recall where a Litter Company man came into New Hampshire was the Hooksett occasion, is that right? A. I don't know how often the Litter people came into New Hampshire. In our particular instance, that is so, at least at our behest. Q. In other words, you are not, of course, aware of all the trips they made, whatever they made, in selling. You are simply referring to the one occasion you know about where it was connected with some product you had sold, is that right? A. That is right. This was a specific instance that I happened to participate in personally. Q. Now, when you sold to the Wilbur & Williams people a product that you had bought from the Nuodex Company, the Wilbur & Williams people were in Massachusetts, right?

MR SANDERS: You mean their place of business?

MR. SULLOWAY: Yes.

A. Their home office is in Massachusetts, yes.

Interrogatories by Mr. Sulloway:

Q. And is it correct that they put their own label on that product? A. We labeled it for them. Q. And they sold it as a product of Wilbur & Williams, is that right? A. That is right. Q. Now, when you incorporated any of the Nuodex products in paint, is it a fact that you had somebody else, some other paint manufacturer do that? A. No. We put it in

ourselves, unless there was a subcontractor making paint for us to our formulation and under our supervision. Q. I think you have referred on one occasion to doing business with some paint company who incorporated the Super Ad-It or other product in that paint? A. I think at that time we were referring to the Durand Paint Company. Q. I was. A. Subsequent to that time I checked my records and find that they did not make any paint in which Super Ad-It was an ingredient for us. Q. So that all of the Super Ad-It products which you bought from Nuodex, which went into paint, you actually incorporated that product in the paint in one of your factories, is that right? A. That is correct. Q. And then sold it as E. & F. King paint? A. That's right. * * * *

OPINION

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 1465

W. H. Elliott & Sons Co., Inc.

v.

E. & F. King & Co., Incorporated

and

Nuodex Products Co., Inc.

A.J.C.

CONNOR, J. This is a civil action brought by W. H. Elliott & Sons Co., Inc., against two foreign corporations, E. & F. King & Co., Incorporated and Nuodex Products Co., Inc. The complaint alleges two theories of recovery on separate counts, the first for negligence, and the second for breach of warranty. Jurisdiction is based on diversity of citizenship, and service of process was made under Rule 4, (d), (3), and (7) of Federal Rules of Civil Procedure in the mode prescribed by the statutory laws of this state. RSA 300: 11. Venue for this court is established by the fact that the plaintiff is a resident of New Hampshire.

Each defendant filed a motion to dismiss, that of defendant King Company being on the sole ground that it was a foreign corporation, not doing business in the District of New Hampshire, and hence not subject to service of process here. This motion has been waived. The defendant Nuodex Products Co.

moved to dismiss upon two grounds, the first, that the complaint failed to state a claim upon which relief could be granted, and second, that Nuodex is a foreign corporation, not doing business in the State of New Hampshire, and therefore not subject to service of process in this district. Upon hearing, the court denied the first part of the motion. Thereafter, a further hearing was had on the question of jurisdiction. Prior thereto, the defendant King Company answered to the merits, and filed a cross-claim against Nuodex, alleging that Nuodex was doing business within the state of New Hampshire and subject to the jurisdiction of this court.

The hearing was limited to two issues: (1) whether the defendant Nuodex was transacting business in New Hampshire so as to be subject to service of process within this district, and (2) whether the defendant Nuodex has waived its right to contest the question by previously arguing and submitting for decision the issue of whether the plaintiff states a claim upon which relief can be granted.

FINDINGS OF FACT

The plaintiff in this action, W. H. Elliott & Sons Co., Inc., hereinafter referred to as Elliott, is a New Hampshire corporation, having its usual place of business in Madbury, New Hampshire. The defendants, E. & F. King & Co., Incorporated, hereinafter referred to as King, and Nuodex Products Co., Inc., hereinafter referred to as Nuodex, are corporations chartered in Massachusetts and New York, respectively. The plaintiff alleges that it suffered substantial property damage due to a product, Super-Adit, manufactured by defendant Nuodex, and added by defendant King to greenhouse paint which King sold to the plaintiff.

Nuodex is a manufacturer of special-purpose chemicals used by various industries, and has its usual place of business in New Jersey. As its products are essentially used by manufacturers, Nuodex does not ordinarily sell through the usual retail market. Instead its sales in the United States are primarily, although not exclusively, entrusted to seventeen corporate sales representatives whose activities are supervised by six regional Nuodex sales managers. In the region which includes New Hampshire, Nuodex' sales representative is D. H. Litter Company (hereinafter referred to as Litter), a New York corporation, having a branch

office in Allston, Massachusetts. Besides representing Nuodex, Litter has at least seven other accounts, mostly with chemical concerns. It is an independent corporation, and Nuodex has no financial interest in it or any control over it. Litter's payment from Nuodex is in the form of a five per-cent commission, and its soliciting personnel are its own employees who are paid directly by it.

Litter's activity in New Hampshire on Nuodex' behalf has been carried on by a single employee. He regularly contacted and solicited all business firms in this state known to have a present or prospective interest in any of Nuodex' products. In order to help Litter stimulate sales, Nuodex furnished it with advertising material and samples. On behalf of Nuodex, the salesman gave customers such technical advice and assistance as he could. On at least two occasions, the New England divisional manager of Litter came into New Hampshire to confer in reference to business pertaining to Nuodex. Although the salesman would occasionally receive an order from a particular customer, the customers would generally forward the order directly to Nuodex, which, in turn, shipped the product to the customer, and Nuodex alone determined whether the purchase could be made on credit. The products promoted in New Hampshire by Litter consisted, at one time or another, of most of Nuodex' output, including Super-Adit, the product here complained of.

On its part, Nuodex carried on few activities independent of Litter. It advertised in various trade journals which circulated in New Hampshire. It sometimes mailed samples directly to buyers, since it maintained a mailing list of all its customers, including those in this state. In one instance, Nuodex sent a technician from its New York laboratory to assist a local firm in solving some fabric-treating problems. Nuodex' most overt act was to register some of its products under the terms of a New Hampshire statute which provides that "it shall be unlawful for any person to distribute, sell, or offer for sale within this state * * * any economic poison which has not been registered * * *." RSA 438: 2.

The product here complained of, Super-Adit, was sold by Litter to King in Massachusetts. King subsequently added this product to a special paint which it was selling for use in greenhouses. While there is no evidence that Elliott purchased this paint directly from King, the present state of the pleadings dis-

closes this to be so. Similarly, there is no evidence that either Nuodex or Litter sold it to the plaintiff, nor is such asserted in either the complaint or answer.

CONCLUSIONS AND RULINGS

The essential question here presented, whether a foreign corporation is subject to service of process, is one of substance. Canvas Fabricators, Inc. v. William E. Hopper & Sons Co., 7th Cir., 1952, 199 F.2d 485, 488. Since there is no federal statute applicable and this is a diversity case, it follows that the issue must be determined by state law, as in matters of substance this court is "in effect only another court of the State * * *." Guaranty Trust Co. v. York, 326 U. S. 99, 108. Such is the rule of this circuit. Pulson, et al. v. American Rolling Mill Co., 1st Cir., 1948, 170 F.2d 193; Kelley v. Delaware, L. & W. R. Co., 1st Cir., 1948, 170 F.2d 195; see also Canvas Fabricators, Inc. v. Hopper & Sons Co., *supra*, 486; Olshansky v. Thyer Mfg. Corp., D.C. N.D. Ill., 1952, 13 F.R.D. 227, 230; Read v. Corbitt, D.C. E.D. Pa., 1950, 10 F.R.D. 125. And this position is further enforced by the fact that the validity of the service of process is predicated upon a state statute.

Despite the foregoing, it has been urged upon this court that this case is governed, not by local law, but by the rule laid down in International Shoe v. Washington, 326 U. S. 310. In that case, the Supreme Court, brushing aside the old distinctions of "presence" and "doing business," announced that due process now requires only that a foreign corporation maintain such minimum standards within the state which is asserting jurisdiction, so that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." Id. 316. In formulating this new "test", the Supreme Court was setting limitations upon state courts and was not defining the lengths to which a federal court must go in asserting jurisdiction over a foreign corporation. If International Shoe applies to federal courts at all, it applies when the federal court is expounding state law in a diversity case by laying down due process limitations upon the scope of its jurisdiction. A possible reason for the parties to the action urging an opposite view upon this court is found in the language of Grace v. Company, 95 N.H. 74. There, the court quotes an earlier New Hampshire decision to the effect that the "question is one of federal law," and goes on to say that it considers "federal decision

as controlling rather than convincing." Id. 76. This statement was taken to mean that federal law and not state law decides whether or not New Hampshire will exercise jurisdiction over a foreign corporation in a particular case. To accept the language as a statement of the law would be to ignore several other factors. First of all, the basic issue involved in all these cases is the scope of a state statute (in New Hampshire RSA 300: 11), and except for the due process limitations placed on it by certain constitutional pronouncements like the International Shoe case, there hardly can be said to be any federal law on the question. Secondly, if a later case, Kenison, C. J., seems to have overruled any such interpretation of the language in Grace v. Company, *supra*, when he pointed out that while "many of the persuasive authorities cited are federal cases, the issue to be decided is one of state law." LaBonte v. Company, 98 N.H. 163, 166. Thirdly, the test laid down in International Shoe v. Washington, *supra*, must be considered in a case such as this, not because the federal constitutional limits upon the acquisition of jurisdiction by state courts as discussed in that case apply directly to federal courts, but because federal consequences cannot properly be attached to an unconstitutional state law.

Turning now to local law, it appears that the Supreme Court of New Hampshire has passed on the question of the power to serve process upon foreign corporations only three times since the International Shoe case. Grace v. Company, *supra*; Taylor v. Company, 97 N. H. 517; LaBonte v. Company, *supra*. In the first of these cases, the trial court, after reserving and transferring the question of jurisdiction over a foreign corporation, was directed to "be guided in its findings and ruling by International Shoe Co. v. Washington, * * * ." Grace v. Company, *supra*, 77. As a result of this case, New Hampshire adopted the "reasonable and just" test (Id. 76), and all previous decisions must be considered as overruled.

In laying down the test of "fair play and substantial justice" the Supreme Court of the United States suggested several "criteria" or "standards" which could be used to measure the facts in each case. Some of these have been utilized by the local court in applying the above quoted test. Without losing sight of the basic principle that each case must be decided on its own facts, Favell-Utley Realty Co., et al. v. Harbor Plywood Corp., D.C. N.D. Calif., 1950, 94 F. Supp. 96, 98, I feel that I should measure

the facts of this case against these standards in reaching my decision.

The first criteria suggested both by the Supreme Court of the United States and of New Hampshire, is whether the defendant's activities were "systematic and continuous." International Shoe v. Washington, *supra*, 320; Taylor v. Company, *supra*, 519. The activities carried on in this state by Litter on behalf of Nuodex were continuous and systematic. Litter's salesman, regularly and systematically, visited various business concerns in New Hampshire, and would attempt to "sell everything for all the companies we represent." It is true that some federal cases have held that "mere solicitation" is not enough. Roberts v. Evans Case Co., 7th Cir., 1955, 218 F.2d 893; Johns v. Bay State Abrasive Products Co., D. C. Md., 1950, 89 F. Supp. 654. But these were based upon local law and not upon constitutional principles. On the other hand, Justice Rutledge has observed that no "business man would regard 'selling,' 'the taking of orders,' 'solicitation,' a. not 'doing business'." Frene, et al. v. Louisville Cement Co., C.A. D.C., 1943, 134 F.2d 511, 516. Commenting upon this, Carter, J., said: "We are in agreement with the conclusion reached by Justice Rutledge and the trend of the courts in the more recent cases that mere solicitation, without more, constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business." Perkins v. Louisville & N. R. Co., D.C. S.D. Calif., 1951, 94 F. Supp. 946, 951; see also, London's Inc. v. Mack Shirt Corporation, D.C. Mass., 1953, 114 F. Supp. 883. This trend has met with local approval. In Taylor v. Company, *supra*, the activity carried on in this state was very similar to that in the case at bar. There, the plaintiff, acting as agent for the defendant, sought out new dealers, helped to servic established accounts, and attempted to stimulate new business for the defendant's products. In holding that the defendant was subject to the jurisdiction of New Hampshire courts, the court recognized that solicitation is an essential commercial activity. "Distribution can be made however only where a market exists, and a market in turn depends upon demand." Id. 520. "In our judgment thi. activity was of such a character as to make it reasonable and just to subject the defendant to the jurisdiction of the courts of this state." Id. 520.

Once accepting the proposition that solicitation is a commercial activity, recognized by New Hampshire as sufficient to con-

stitute "transacting business" under New Hampshire RSA 300: 11(c), we are faced with the problem whether or not the activities of Litter can be attributed to Nuodex. I believe the fact that Litter was a separate and independent corporation and not an "agent" of Nuodex, in the legal sense, is not a bar to service of process upon Nuodex in New Hampshire. In LaBonte v. Company, *supra*, the Supreme Court held the defendant, The American Mercury, subject to service of process, even though all of the activities attributed to the defendant in this state were carried on by the Rumford press, an independent and separate corporation, which was even less under the direction of American Mercury than Litter was under the direction of Nuodex. Nor is it of any significance that Litter worked for several other companies besides Nuodex. Rumford Press printed many magazines other than the American Mercury. Learned Hand, J., expressed what seems to me to be the best rule when he said: " * * * we cannot see that it was important that the agent worked for several principals." Bomze, et al. v. Nardis Sportswear, Inc., 2d Cir., 1948, 165 F.2d 33, 36.

Whether or not it is a violation of due process to hold Nuodex subject to service on account of the activities of an independent corporation, and whether it is of consequence that Litter is not a New Hampshire corporation, are questions to be deferred until the other criteria or standards are resolved. Under the rule of this circuit, the question of due process "is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation." Pulson v. American Rolling Mill Co., *supra*, 194.

A second criterion or "standard" suggested by the Supreme Court of the United States and the Supreme Court of New Hampshire is to estimate the inconvenience "which would result to the corporation from a trial away from its 'home' or principal place of business." International Shoe v. Washington, *supra*, 317; cited and adopted in Taylor v. Company, *supra*, 519. In the case at bar, there seems to be no basis for holding that it would be a hardship to require Nuodex to defend this suit in New Hampshire. In weighing the equities of this case, it appears that it is not inconvenient to hold trial here. Nuodex admits that it can be served with process in Massachusetts, and the few extra miles of travel to the district of the situs imposes no undue burden.

A third criterion suggested in International Shoe (at page 319)

is to examine the extent to which the defendant exercised the privilege of conducting activities within New Hampshire, and has enjoyed the benefits and protection of its laws. It appears that the local courts have not adopted this criterion, for nowhere is it discussed. But it could be observed that the defendant did take advantage of the provisions of New Hampshire RSA 438: 3, and registered its products so that they might be legally sold in this state, and, as the United States Supreme Court observes, the "exercise of that privilege may give rise to obligations * * *." International Shoe v. Washington, *supra,* 319.

The fourth criterion or standard suggested in the International Shoe case (at p. 319) is to examine how far the obligations sued upon arise out of, or are connected with, the activities of the foreign corporation within the state. This test has been adopted by the Supreme Court of New Hampshire. Taylor v. Company, *supra,* 519, 521; LaBonte v. Company, *supra,* 168. It probably is most clearly expressed in the Taylor case, where it was said: "It is not essential that the cause of action arise in New Hampshire, provided it arises out of business done here." (See p. 519). I am unable to discover any activity in the state which is connected with the injury here complained of. There is no evidence that King purchased Super-Adit because of solicitation or advertising in New Hampshire, nor is there any evidence that the plaintiff purchased King's paint because of Nuodex' activities within the state. Therefore, I conclude that this fourth "standard" is not met.

This raises the question as to whether all of the standards or criteria must be present in order to confer jurisdiction. In International Shoe, Chief Justice Stone continually refers to these as criteria or "standards." (See pp. 319, 320). But the Supreme Court of New Hampshire, purporting to adopt the language in that case, refers to the criterion that the cause of action arise out of or be connected with activities within the state as a "requirement." Taylor v. Company, *supra,* 521; LaBonte v. Company, *supra,* 168. Therefore, it would seem that in New Hampshire there is no jurisdiction unless this "requirement" is met. It does not matter that the court might not have intended to be as strict as this language sounds. The Court of Appeals for this circuit has ruled that "Whether this be so or not we think it is no business for a federal court to meddle in. * * * We think it is the business of the federal court to follow the state court's construc-

tion of its own statute * * * until the state court announces a different rule." Pulson v. American Rolling Mill Co., *supra*, 195. In the light of the state court's use of the word "requirement," I feel that I have no choice but to rule that this court lacks jurisdiction.

Nor is there any merit in the argument that the state must grant jurisdiction if the federal limits of due process allow. "Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process." Missouri P. R. Co. v. Clarendon Co., 257 U. S. 533, 535; Perkins v. Benguet Consolidated Mining Co., et al., 342 U. S. 437, 440.

It is jointly urged by the plaintiff and the co-defendant that Nuodex, by submitting the first branch of its motion to dismiss* on the ground that the complainant fails to state a claim upon which relief can be granted, waived the question of jurisdiction raised in the second branch of its motion.

This contention invites but brief consideration. Whatever support this claim of waiver might have had under common law practice, the theory has no standing under Rule 12(b) of the Federal Rules of Civil Procedure, which provides in part as follows: "Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the respective pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (2) lack of jurisdiction over the person, * * * (6) failure to state a claim upon which relief can be granted, * * * . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by

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*The motion: "Now comes the defendant Nuodex Products Co., Inc. and moves the Court as follows: (1) To dismiss the action because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc. upon which relief can be granted.

(2) To dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant Nuodex Products Co., Inc. is a corporation organized under the laws of the State of New York, which has never done business within The State of New Hampshire, and was not and is not subject to service of process within the District of New Hampshire."

being joined with one or more other defenses or objections in a responsive pleading or motion. * * * ."

The authorities seem to be in complete accord that the joining of defenses in a motion creates no waiver. A like situation was before the court in Olshansky v. Thyer Mfg. Corp., *supra*, and the claim of waiver was rejected. See also, Orange Theatre Corp. v. Rayheratz Amusement Corp., 3d Cir., 1944, 139 F.2d 871, 874; Blank v. Bitker, 7th Cir., 1943, 135 F.2d 962, 966; 2 Moore's Federal Practice, 2262 - 2264.

Nuodex not being subject to service within this district, the return must be quashed and the action dismissed. An order will be so entered.

April 18, 1956.

ORDER

April 18, 1956

(Caption Omitted)

In conformity with the opinion filed this date, it is ordered that as to Nuodex Products Co., Inc. the return be and it hereby is quashed and the action be and it hereby is dismissed.

Aloysius J. Connor
United States District Judge.

PLAINTIFF-APPELLANT'S STATEMENT OF QUESTIONS INVOLVED ON APPEAL

(Caption Omitted)

1. Whether the District Court erred in dismissing a diversity complaint as to the foreign corporation Nuodex Products Co., Inc., after finding on the evidence that this defendant was doing business in New Hampshire continuously and systematically, sufficiently to constitute "transacting business" under New Hampshire R.S.A. 300:11(c), and would not be inconvenienced to defend the action in New Hampshire, when the cause of action arose wholly within the District of New Hampshire.

2. Whether the District Court erred in its interpretation and application of the law of New Hampshire relating to establishing jurisdiction over foreign corporations transacting business in the District of New Hampshire, for diversity jurisdiction in the District Court, where the cause of action arose in the District.

3. Whether the District Court erred in ruling that a diversity cause of action arising in the District must arise out of or be

No. [redacted]
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JOHN T. FEY, Clerk

No. 5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

E. & F. KING & CO., INCORPORATED
Cross-claimant, Appellant

vs.

NUODEX PRODUCTS CO., INC.
Cross-defendant, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW HAMPSHIRE

RECORD APPENDIX TO BRIEF FOR THE APPELLANT

Submitted by

UPTON, SANDERS & UPTON
Attorneys for Appellant

No. 5136

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E. & F. KING & CO., INCORPORATED
Cross-claimant, Appellant

vs.

NUODEX PRODUCTS CO., INC.
Cross-defendant, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

RECORD APPENDIX TO BRIEF FOR THE APPELLANT

Submitted by

UPTON, SANDERS & UPTON
Attorneys for Appellant

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ADDITIONAL RELEVANT DOCKET ENTRIES

1956

June 22 Notice of appeal of defendant E. & F. King & Co., Incorporated, and certificate of service.

Statement of points to be relied upon by the appellant E. & F. King & Co., Incorporated, and certificate.

Statement of parts of record appellant proposes to print in the appendix of its brief, pursuant to Rule 24 of the Court of Appeals, and certificate.

MOTION OF NUODEX PRODUCTS CO., INC. TO DISMISS

CROSS-CLAIM OF E. & F. KING & CO., INCORPORATED

(Caption Omitted)

Now comes Nuodex Products Co., Inc., named as a defendant in the above-entitled action, and, while specifically reserving all of its rights under its Motion to Dismiss, heretofore filed herein, respectfully moves to dismiss the "Cross-Claim" of defendant E. & F. King & Co., Incorporated, on the following grounds:

(1) Nuodex Products Co., Inc., is not now, and never has been, subject to the jurisdiction of this Court in the proceedings in which said "Cross-Claim" was filed.

(2) Said "Cross-Claim" fails to state a cause upon which relief can be granted.

NUODEX PRODUCTS CO., INC.
By SUTTONWAY, JONES, HOLLIS & GODFREY
Its Attorneys

REQUESTS OF E. & F. KING & CO., INCORPORATED FOR FINDINGS AND RULINGS

(Caption Omitted)

E. & F. King & Co., Incorporated requests that the Court make the following findings and rulings:

* * *

23. In addition at all times Nuodex has packaged and sold Super Adit in bulk directly to its paint manufacturing customers which in turn have incorporated the product in their paints. These customers have totaled some 100 and they have sold and distributed such paints throughout the United States.

24. As such a paint manufacturer King purchased from Nuodex bulk Adit from 1950 to 1953 and Super Adit thereafter to September, 1954. King used Adit solely for repackaging and sale to Wilbur & Williams, a Massachusetts concern, which in turn placed its own label of "Fungus-Ban" on the bottles and sold and distributed the same all over the United States, including New Hampshire. King similarly repackaged and sold Super-Adit after 1953 to Wilbur & Williams and again the latter sold and distributed the product labeled "Fungus Ban" in the same territory. In addition King embodied Super-Adit in all its exterior paints, including greenhouse paints.

25. Up to September, 1954, King further continuously purchased antiskinning agents from Nuodex, which it used in most of its industrial finish paints, and also Nuodex driers, which it added to its industrial exterior and interior paints, and to its putty. King purchased all Nuodex products through Litter, the sales representative, and the latter at all times was not only aware of the use which King was making of Adit and Super-Adit, but also Nuodex driers and antiskinning agents. Nuodex employees were similarly acquainted with the use being made by King of these various Nuodex products.

26. From 1950 to 1954 King regularly sold paint and putty containing one or more Nuodex products to 50 or 60 New Hampshire customers, about 40 of whom regularly purchased from King paints containing Super-Adit. At all times subsequent to 1950 Litter was further aware that King was selling its paints and putty continuously and extensively in New Hampshire.

* * *

29. In its complaint the plaintiff alleges substantial damages as a result of the Nuodex Super-Adit embodied in the greenhouse paint sold by King to the plaintiff. The greenhouses in which the alleged damage occurred are situated in Madbury, New Hampshire, and accordingly it is agreed that if the alleged damage resulted it of course occurred in New Hampshire.

* * *

F. & F. KING & CO., INCORPORATED
By its attorneys
UPTON, SANDERS & UPTON
By JOHN H. SANDERS

MOTION OF F. & F. KING & CO., INC. TO AMEND AND SUPPLEMENT FINDINGS OF FACT

(Caption Omitted)

Now comes F. & F. King & Co., Incorporated and moves the Court to amend and supplement its findings of fact heretofore filed, in the following particulars:

1. Make the following additional findings of fact:

(a) At all times Nuodex has packaged and sold Super-Adit in bulk directly to its paint manufacturing customers which in turn have incorporated the product in their paints. These customers have totaled some 100 and they have sold and distributed such paints throughout the United States.

(b) As such a paint manufacturer King purchased from Nuodex bulk Adit from 1950 to 1953 and Super-Adit thereafter to September, 1954. King used Adit solely for repackaging and sale to Wilbur & Williams, a Massachusetts concern, which in turn placed its own label of "Fungus-Ban" on the bottles and sold and distributed the same all over the United States, including New Hampshire. King similarly repackaged and sold Super Adit after 1953 to Wilbur & Williams and again the latter sold and distributed the product labeled "Fungus-Ban" in the same territory. In addition King embodied Super-Adit in all its exterior paints, including greenhouse paints.

(c) Up to September, 1954, King further continuously purchased anti-skinning agents from Nuodex, which it used in most of its industrial finish paints, and also Nuodex driers, which it added to its industrial exterior and interior paints, and to its putty. King purchased all Nuodex products through Litter, the sales representative, and the latter at all times was not only aware of the use which King was making of Adit and Super-Adit, but also Nuodex driers and antiskinning agents. Nuodex employees were similarly acquainted with the use being made by King of these various Nuodex products.

(d) From 1950 to 1954 King regularly sold paint and putty containing one or more Nuodex products to 50 or 60 New Hampshire customers, about 40 of whom regularly purchased from King paints containing Super Adit. At all times subsequent to 1950 Litter was further aware that King was selling its paints and putty continuously and extensively in New Hampshire.

(e) In its complaint the plaintiff alleges substantial damages as a result of the Nuodex Super-Adit embodied in the greenhouse paint sold by King to the plaintiff. The greenhouses in which the alleged damage occurred are situated in Madbury, New Hampshire, and accordingly it is agreed that if the alleged damage resulted it of course occurred in New Hampshire.

E. & F. KING
By its attorneys
UPTON, SANDERS & UPTON
By JOHN H. SANDERS

ANSWER OF DEFENDANT NUODEX PRODUCTS CO., INC. TO MOTION OF DEFENDANT KING COMPANY TO AMEND AND SUPPLEMENT FINDINGS OF FACT

(Caption Omitted)

COMES now Defendant Nuodex Products Co., Inc. and in opposition to the above cited motion of defendant King Company Inc. respectfully says:

1. This Honorable Court is without jurisdiction to consider the above cited motion which was filed on April 26, 1956 inasmuch as prior to its filing plaintiff Elliott and Sons, Inc. on April 25, 1956 had filed notice of appeal of the Order complained of to the First Circuit Court of Appeals, thereby causing the jurisdiction of that Court to attach to this action and the jurisdiction of this Court to be withdrawn from it.
2. The supplemental findings sought by the movant do not concern necessary facts essential to the Court's order and they are therefore improper.
3. The requested supplemental findings are unsupported by the evidence and in any case they are irrelevant and immaterial to any issue which was before the Court upon Defendant Nuodex' motion to quash service and dismiss the action as to it, and the findings sought are therefore improper.

WHEREFORE, Defendant Nuodex Products Co., Inc. respectfully prays the Court that Defendant King Company's Motion to Amend and Supplement Findings of Fact be Denied.

NUODEX PRODUCTS CO., INC.
By: SULLOWAY, JONES, HOLLIS & GODFREY

ORDER OF MAY 31, 1956

The motion of defendant E. & E. King & Co., Incorporated, to amend and supplement findings of fact is denied.

ALOYSIUS J. CONNOR
United States District Judge

NUODEX EXHIBIT D

This is to certify that according to the records of the Commissioner of Agriculture there were registered with this office under the provisions of the economic poisons law of the State of New Hampshire (Laws of 1949, c. 311, eff. January 1, 1950, 4 R.S.A., c. 438) by or in behalf of Nuodex Products Company, Inc. the following products from time to time:

January 12, 1950	Nuodex-Copper 8%
April 7, 1950	Nuodex 321 SS
May 11, 1950	Ad-It
January 10, 1951	Nuodex 321 SS
January 10, 1951	Ad-It
March 1, 1951	Ad-It
February 4, 1952	Ad-It — Retail
February 4, 1952	Ad-It — Industrial
February 4, 1952	Nuodex 84
January 22, 1953	Super Ad-It
March 23, 1953	Nuodex 84
June 18, 1953	Super Ad-It — Retail
August 20, 1953	Nuodex 100-WD
January 5, 1954	Nuodex 100-WP
January 5, 1954	Nuodex Super Ad-It — Industrial
January 5, 1954	Nuodex Super Ad-It — Retail
July 29, 1954	Nuodex 84
January 13, 1955	Super Ad-It — Industrial
January 13, 1955	Super Ad-It — Retail
January 13, 1955	Nuodex 100-WP
October 11, 1955	Nuodex 84

s GEORGE H. LARAMIE
Control Supervisor
N. H. Dept. of Agriculture

Civ. 1465
Nuodex D
Oct. 28, 1955

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.

W. H. ELLIOTT & SONS CO., INC.,
Plaintiff, Appellant

v.

NUODEX PRODUCTS CO., INC.,
Defendant, Appellee

No.

E. & F. KING & CO., INCORPORATED
Cross-defendant, Appellant

v.

NUODEX PRODUCTS CO., INC.,
Cross-defendant, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW HAMPSHIRE

CONSOLIDATED RECORD APPENDIX SUBMITTED JOINTLY BY PLAINTIFF-APPELLANT AND CROSS-CLAIMANT APPELLANT

Submitted jointly by

McLane, Carleton, Graf, Greene & Brown
and, Stanley M. Brown
Attorneys for Plaintiff

and

Upton, Sanders & Upton
and, John H. Sanders
Attorneys for Cross-Claimant Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.

W. H. Elliott & Sons Co., Inc. v. Nuodex Products Co., Inc.

No.

E. & F. King & Co., Incorporated v. Nuodex Products Co., Inc.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW HAMPSHIRE

CONSOLIDATED RECORD APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

W. H. ELLIOTT & SONS CO., INC.
Plaintiff
v.
E. & F. KING & CO., INCORPORATED
and
NUODEX PRODUCTS CO., INC.
Defendants

Civil Action No. 1465

ADDITIONAL DOCKET ENTRIES

1956

Apr. 25 Plaintiff's Notice of Appeal from order of April 18, 1956.

Apr. 26 Motion of defendant E. & F. King & Co. Inc. to amend and supplement findings of fact.

May 2 Answer of defendant Nuodex Products Co. Inc. to motion of defendant King Company to amend and supplement findings of fact.

May 22 Hearing is had on motion of defendant, E. & F. King & Co. Inc. to amend and supplement findings of fact. Taken under advisement. Connor, J.

May 31 Above motion denied. Connor, J.
Record certified to Circuit Court of Appeals.

June 22 Notice of Appeal of defendant, E. & F. King & Co., Inc.
Statement of Points to be Relied upon by the appellant, E. & F. King & Co., Inc.
Statement of Parts of Record Appellant Proposes to Print in the Appendix of its Brief Pursuant to Rule 24 of the Court of Appeals.

June 29 Additional documents certified to Court of Appeals.

Aug. 13 Reporter's transcript of Excerpts from hearing on motions, February 28, 1955.

Aug. 15 Reporter's transcript of Excerpts from hearing on motions.

Aug. 24 Reporter's transcript of hearing on defendant Nuodex

1956

motion that deposition of Charles J. Gotthardt be not closed.

Oct. 11 Submission to the Court of Motion of Nuodex Products Co., Inc. to Dismiss the Cross Claim of E. & F. King & Co., Inc.

Plaintiff's motion for issuance of certificate pursuant to Rule 54(b).

Motion of E. & F. King & Co., Inc. for issuance of certificate pursuant to Rule 54(b).

Oct. 22 Hearing is had on plaintiff's motion for the issuance of certificate pursuant to Rule 54(b). Formal submission of defendant E. & F. King & Co., Inc. for determination by the Court of the issues raised by the motion of Nuodex Products Co., Inc. to dismiss the cross claim of King on ground of lack of jurisdiction and on motion of E. & F. King & Co. for issuance of a certificate pursuant to Rule 54(b). Taken under advisement. Connor, J.

Oct. 25 Order, Connor, J., in accordance with motions of plaintiff and defendant King, under Rule 54(b), determining that after entry of judgment on order of this court of April 18, 1956, there was not just cause for delay in seeking a review of issues raised by that order, and expressly directing that judgment be entered on that order, to permit plaintiff to perfect such appeal without delay.

Order, Connor, J., on motion of defendant Nuodex Products Co. Inc. to dismiss cross-claim of E. & F. King & Co. Inc., granted on issue of jurisdiction raised by ground (1) of said motion. Conformably to an agreement by the parties, the issue raised by ground (2) was deferred for later hearing, and this order is made without consideration of its merits.

Oct. 27 Plaintiff's Notice of Appeal.

Oct. 31 Motion of E. & F. King & Co. Inc. for issuance of certificate pursuant to Rule 54(b) of the Rules of Civil Procedure.

Oct. 31 Order, Connor, J., in accordance with motion of defendant E. & F. King & Co. Inc. under Rule 54(b).

Nov. 1 Notice of Appeal of defendant E. & F. King & Co. Inc.

SUBMISSION TO THE COURT OF MOTION OF NUODEX PRODUCTS CO., INC. TO DISMISS THE CROSS CLAIM OF E. & F. KING & CO., INCORPORATED

(Caption & Signature Omitted)

Now comes E. & F. King & Co., Incorporated and respectfully represents:

1. On October 20, 1955 E. & F. King & Co., Incorporated filed its cross claim against the defendant Nuodex Products Co., Inc. and in response thereto on October 21, 1955 Nuodex Products Co., Inc. filed its motion to dismiss said cross claim on the grounds:

> "(1) Nuodex Products Co., Inc. is not now, and never has been, subject to the jurisdiction of this Court in the proceedings in which said 'Cross-Claim' was filed.
>
> "(2) Said 'Cross-Claim' fails to state a cause upon which relief can be granted."

2. At the hearing on the motion of Nuodex Products Co., Inc. to dismiss the complaint of W. H. Elliott & Sons Co., Inc. on the ground that "Nuodex Products Co., Inc. is not now, and never has been, subject to the jurisdiction of this Court" it was agreed by the parties that all evidence introduced during said hearing should be deemed evidence in the later determination by the Court of the motion of Nuodex Products Co., Inc. to dismiss, on the same ground, the cross claim of E. & F. King & Co., Incorporated, but there nevertheless was expressly reserved by E. & F. King & Co., Incorporated the right to introduce such further or additional evidence as it might deem advisable in support of jurisdiction over Nuodex Products Co., Inc.

3. E. & F. King & Co., Incorporated was permitted to participate fully in said hearing and has no further evidence to offer on said motion to dismiss on said ground its cross claim against Nuodex Products Co., Inc.

WHEREFORE E. & F. King & Co., Incorporated hereby submits, on the evidence heretofore introduced, for the determination of the Court the issues raised by the motion of Nuodex Products Co., Inc. to dismiss its cross claim on the ground that it "is not

now, and never has been, subject to the jurisdiction of this Court in the proceeding in which said 'Cross-Claim' was filed".

MOTION FOR ISSUANCE OF CERTIFICATE PURSUANT TO THE PROVISIONS OF RULE 54(b) OF THE CIVIL RULES OF PROCEDURE.

(Caption Omitted)

Now comes E. & F. King & Co., Incorporated and moves, pursuant to the provisions of Rule 54(b) of the Rules of Civil Procedure, that the Court issue a certificate that there is no just reason for delay in seeking an appellate review of its Opinion and Order of April 18, 1956, granting the motion of Nuodex Products Co., Inc. to dismiss the complaint on the ground of lack of jurisdiction of the Court over Nuodex Products Co., Inc. and that the Court expressly direct that judgment be entered on that order, to permit the said defendant E. & F. King & Co., Incorporated to perfect said appeal without delay.

E. & F. King & Co., Incorporated

MOTION

(Caption Omitted)

Plaintiff moves, under Rule 54(b), that the Court issue a certificate that there is no just reason for delay in seeking a review of its Opinion and Order of April 18, 1956, granting Defendant Nuodex' Motion to Dismiss the complaint on the ground of lack of jurisdiction of the Court over this defendant; and that the Court expressly direct that judgment be entered on that order, to permit Plaintiff to perfect such appeal without delay.

Respectfully submitted,

W. H. Elliott & Sons Co., Inc.

ORDER

(October 25, 1956)

(Caption Omitted)

In accordance with the motions of the plaintiff, W. H. Elliott & Sons Co., Inc., and of the defendant E. & F. King & Co., Incorporated, under Rule 54(b), I determine that after entry of judgment on the order of this court of April 18, 1956, there was

no just cause for delay in seeking a review of the issues raised by that order, and I expressly direct that judgment be entered on that order, to permit plaintiff to perfect such appeal without delay.

ALOYSIUS J. CONNOR
United States District Judge

ORDER
(October 25, 1956)
(CAPTION OMITTED)

The motion of the defendant Nuodex Products Co., Inc. to dismiss the cross-claim of E. & F. King & Co., Incorporated is granted on the issue of jurisdiction raised by ground (1) of said motion. Conformably to an agreement by the parties, the issue raised by ground (2) was deferred for later hearing, and this order is made without consideration of its merits.

ALOYSIUS J. CONNOR
United States District Judge.

NOTICE OF APPEAL

Notice is hereby given that W. H. Elliott & Sons, Inc., Plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the order of the District Court of April 18, 1956, granting Defendant Nuodex' Motion to Dismiss the Complaint on the ground of lack of jurisdiction over this defendant on which final judgment has been entered under Rule 54(b). The points on appeal, the Record to be printed, and the Briefs to be filed on appeal are those already filed in Court of Appeals Docket No. 5125.

MOTION FOR ISSUANCE OF CERTIFICATE
Pursuant to Rule 54 (b) of the Rules of Civil Procedure

Now comes E. & F. King & Co., Incorporated, and moves, pursuant to Rule 54 (b) of the Rules of Civil Procedure, that the Court issue a certificate that there is no just reason for delay in seeking an appellate review of its order of October 25, 1956, granting motion of Nuodex Products Co., Inc. to dismiss the cross-claim of E. & F. King & Co., Incorporated, against Nuodex

Products Co., Inc., on the ground that Nuodex Products Co., Inc. is not now and never has been subject to the jurisdiction of this District Court in the proceeding in which said cross claim was filed; and that the Court expressly direct that judgment be entered on that order to permit said defendant E. & F. King & Co., Incorporated, to perfect said appeal without delay.

E. & F. King & Co., Incorporated

ORDER

In accordance with the motion of the defendant E. & F. King & Co., Incorporated, under Rule 54 (b) I determine that after entry of judgment on the order of this Court of October 25, 1956 there was no just cause for delay in seeking a review of the issues raised by that order and I expressly direct that judgment be entered on that order to permit the defendant E. & F. King & Co., Incorporated to perfect such appeal without delay.

Aloysius J. Connor
United States Judge

October 31, 1956.

NOTICE OF APPEAL

Notice is hereby given that E. & F. King & Co., Incorporated, defendant above named, hereby appeals to the United States Court of Appeals for the First Circuit from:

The order of the District Court entered April 18, 1956 whereby the return of service of the complaint upon the defendant Nuodex Products Co., Inc. was quashed and said complaint was dismissed, on which order final judgment has been entered on October 25, 1956, pursuant to the provisions of Rule 54 (b) of the Federal Rules of Civil Procedure.

The order of the District Court entered May 31, 1956 denying the motion filed by the defendant E. & F. King & Co., Incorporated, on April 26, 1956 to amend and supplement the findings of fact of the said District Court;

The order of the District Court entered October 25, 1956, whereby the cross claim of E. & F. King & Co., Incorporated, against Nuodex Products Co., Inc., was dismissed on the ground that Nuodex Products Co., Inc. is not now, and never

has been subject to the jurisdiction of this District Court upon which order final judgment has been entered on October 31, 1956 pursuant to the provisions of Rule 54 (b) of the Federal Rules of Civil Procedure.

The points on appeal are those already filed in the First Circuit Court of Appeals, Docket No. 5136, E. & F. King & Co., Incorporated, cross-claimant, Appellant, vs. Nuodex Products Co., Inc., cross-defendant, Appellee, which are hereby referred to and are made a part hereof and apply to all orders and judgments designated by this appeal; the record to be printed and the brief to be filed on this appeal are those already filed in the aforesaid appeal, Docket No. 5136.

LIBRARY
SUPREME COURT, U.S.

In the Supreme Court of the United States
October Term, 1956

No. ~~1116~~ 216

Nuodex Products Co., Inc.
Defendant, Petitioner

v.

W. H. Elliott & Sons Co., Inc.
Plaintiff, Respondent

No. .....

Nuodex Products Co., Inc.,
Cross-defendant, petitioner

v.

E. & F. King & Co., Incorporated
Cross-claimant, respondent

Petition For Writ of Certiorari

Submitted by
George B. Rowell
WARNER STACKPOLE STETSON & BRADLEE
84 State Street
Boston, Mass.
Frank J. Sulloway of
SULLOWAY HOLLIS GODFREY and SODEN
3 Capitol Street, Concord, N. H.
and
Gordon M. Tiffany of
TIFFANY and OSBORNE
88 North Main Street, Concord, N. H.

In the Supreme Court of the United States
October Term, 1956

No. . . . . . .

Nuodex Products Co., Inc.
Defendant, Petitioner

v.

W. H. Elliott & Sons Co., Inc.
Plaintiff, Respondent

No. . . . . . .

Nuodex Products Co., Inc.,
Cross-defendant, petitioner

v.

E. & F. King & Co., Incorporated
Cross-claimant, respondent

Petition For Writ of Certiorari

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the First Circuit

To the Honorable Chief Justice and
Associate Justices of the Supreme
Court of the United States:

Your petitioner, Nuodex Products Co., Inc., a New York corporation, respectfully prays that a writ of certiorari be issued to review certain judgments hereinbelow of the United States Court of Appeals for the First Circuit entered March 26, 1957.

(a) OPINIONS BELOW

The opinions entered by the Court of Appeals on the judgments herein petitioned to be reviewed are unreported at the time of printing hereof but are reproduced below in Appendix A beginning at page 43. These Court of Appeals judgments reversed two judgments of the District Court for the District of New Hampshire duly entered April 18, 1956 and October 25, 1956 in its case No. 1465, the opinion in which was reported at 144 F. Supp. 401. The District Court opinion is reproduced in Appendix B hereof beginning at page 57.

A duly certified transcript of the record of the case, including the proceedings in the Court of Appeals as well as in the District Court, is transmitted herewith in accordance with the Rules of this Court.

---

[1] The several sections of this Petition are lettered to correspond with the requirements of a Petition for Certiorari as set forth in Rule 23 of Revised Rules of the Supreme Court of the United States effective July 1, 1954.

(b) GROUNDS OF JURISDICTION

The judgments herein petitioned to be reviewed were entered by the United States Court of Appeals for the First Circuit on March 26, 1957 (R 372).

Motion to stay the mandate of the Court of Appeals pending Petitioner's application to the Supreme Court of the United States for a writ of certiorari was duly filed in the Court of Appeals, and was granted by it on April 9, 1957 (R. 373).

Jurisdiction is conferred upon the Supreme Court of the United States to review the judgment of the Court of Appeals herein by 28 U.S.C. §1254 (1).

(c) QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in reversing the District Court's finding that plaintiff's claim had no connection with any local contact or activity of the nonresident corporate defendant, and in predicating such a connection upon Nuodex' registration of its product, Super Ad-it with the New Hampshire Commissioner of Agriculture under the Economic Poisons Law of the State.

2. Whether under the "due process" clause of the Fourteenth Amendment the Court of Appeals erred in finding Petitioner's contacts with New Hampshire sufficient to sustain the jurisdiction of the District Court as to its person in view of the undisputed evidence and clear weight of the evidence as to the tenuous and insubstantial "quality and nature" of these contacts, their occasional and fleeting occurrence, and the insignificant extent

* The following designations will be used herein to refer to the certified copy of the record below and to the several record appendices of the various parties in the Court of Appeals:

R—Refers to Certified Copy of Record Appendices and Proceedings Below;

PRA—Refers to Plaintiff-Appellant's Record Appendix filed in Court of Appeals;

CCRA—Refers to Record Appendix of Cross-Claimant, Appellant, King in Court of Appeals;

CRA—Refers to Consolidated Record Appendix Submitted jointly by Plaintiff, Appellant and Cross-Claimant, Appellant in Court of Appeals;

DRA—Refers to Consolidated Record Appendix of Defendant and Cross-Defendant, Appellee, Nuodex, in Court of Appeals.

of Petitioner's local business (*International Shoe Co.* v. *Washington*, 326 US 310 at 319, 320, 90 L. Ed. 95 at 104 (1945).

3. Whether the New Hampshire jurisdiction statute with respect to foreign corporations extends local jurisdiction over them to the outermost limits of federal due process if those limits are to be construed by standards more expansive than those put upon the doctrine of *International Shoe Co.* v. *Washington* by the Supreme Court of New Hampshire.

(d) CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The United States Constitution, Amendments, Article XIV, §1
Supreme Court jurisdiction statute (28 U.S.C. §1254)
The federal diversity statute (28 U.S.C. §1332)
The federal venue statute (28 U.S.C. §1391)
The Federal Rules of Civil Procedure, Rule 4 (d) (3) and 4 (d) (7)
The New Hampshire statute for service of process on foreign corporations (RSA 300:11)
The New Hampshire Economic Poisons Law (RSA 438:1-17)

For texts of foregoing, see Appendix C, *infra*, beginning at page 67.

(e) (g) STATEMENT OF THE CASE

The proceedings below. This is a petition for two writs of certiorari to review judgments of the Court of Appeals for the First Circuit in two companion cases in which that Court vacated two orders of the District Court of New Hampshire by which the District Court had quashed the return and dismissed the action and cross-claim herein as to the nonresident corporate defendant, Nuodex (the petitioner herein), on the ground that such defendant was not subject to the Court's jurisdiction. The underlying case is a civil action by W. H. Elliott & Sons Co., Inc., a New Hampshire corporation (sometimes hereinafter referred to as Elliott) against two foreign manufacturing corporations, E. & F. King & Co., Inc., a Massachusetts corporation (herein-

after sometimes referred to as King) and Nuodex Products Co., Inc., a New York corporation (hereinafter sometimes referred to as Nuodex). Jurisdiction was asserted in the District Court upon the basis of diversity of citizenship, and service was purportedly had upon the nonresident defendant corporations by service upon the Secretary of State of The State of New Hampshire. The complaint alleges both negligence (Count 1, R 6; PRA 6) and breach of warranty (Count 2, R8; PRA 8) as bases for plaintiff's right to recover against each defendant for damages claimed to have been suffered by it in New Hampshire as a result of its purchase and use of an alleged defective greenhouse paint manufactured by King in Massachusetts containing an alleged improper ingredient supplied to King by Nuodex. There is no claim that Nuodex' sale of this ingredient to King bore any relation to New Hampshire.

Both defendants filed motions to dismiss the complaint for jurisdictional reasons pursuant to Rule 12 (b) of the FEDERAL RULES OF CIVIL PROCEDURE (R 11, 67; PRA 11, DRA 1), but on October 20, 1955 King waived its motion without hearing thereon and filed its answer admitting jurisdiction (R 11; PRA 11). At the same time King filed a cross-claim against Nuodex (R 13, PRA 13). Nuodex seasonably moved that this cross claim in turn be dismissed (R 57; CCRA 3). After a four-day hearing supplemented by two depositions the Nuodex motions were sustained, and orders were entered dismissing the action on April 18, 1956 (R 52, PRA 52) and the cross action on October 25, 1956 (R 349; CRA 7). On October 25, 1956 the District Court also entered orders under Rule 54 (b) that there was no just cause for delay in review of the two orders of dismissal (R 348, 350; CRA 6, 8). Thereafter on October 27 and November 1, 1956 plaintiff and cross claimant respectively filed Notices of Appeal (R 349 350; CRA 7, 8) and these appeals were heard by the Court of Appeals for the First Circuit on November 7, 1956. On March 26, 1957 the Court of Appeals entered its judgment reversing the judgment of the District Court (R 372). This order was accompanied by the filing of three separate written opinions, one by each of the three judges of the Court of Appeals who had heard the arguments (R 355; Appendix A *infra*, page 43 *et seq.*)

The material facts. The basic evidentiary facts bearing upon

the issues herein before the Court are subject to little dispute. There is, however, some variation among the parties and the several judges of the two courts which have reviewed the evidence as to the manner in which these facts may properly be characterized and labeled. In this statement, therefore, we shall endeavor to summarize the facts primarily in terms of basic evidence with a minimum of characterization.

Plaintiff is the proprietor of certain greenhouses in Madbury, New Hampshire, and this action is brought by it to recover for certain damages allegedly incurred as a result of its use in them of No. 1004 Greenhouse White paint manufactured by King, a Massachusetts manufacturer, and purchased by plaintiff from King. This paint allegedly incorporated as an ingredient Nuodex' product, Super Ad-it. There is no evidence which in any way connects any local activity of Nuodex in New Hampshire with Elliott's purchase of King's paint.

King admits that its sale of paints and putties to New Hampshire customers were $37,000 in 1953 and $44,000 in 1954, and that to promote and serve its New Hampshire business it at all times material hereto had both a salesman and a specialist regularly assigned there. (R 40; PRA 40). The evidence is uncontradicted that this paint was sold as E. & F. King paint (R 43; PRA 43) and that neither Nuodex nor its New England sales representative, Litter, had anything to do with procuring any sales of King products in New Hampshire. (R 41, 81; PRA 41; DRA 15). There is no evidence that plaintiff was even aware that Nuodex' product was included in the paint formula until after the harm occurred.

The defendant petitioner, Nuodex Products Co., Inc., is a New York corporation (R 85; DRA 19) which is engaged in the manufacture of certain chemical products in the vicinity of metropolitan New York and also at Long Beach, California (R 74; DRA 8) which it sells primarily to industrial consumers (R 75; DRA 9). It has, and has had, no plant, bank accounts or

This was the finding of the District Court (Appendix B *infra*). The Court of Appeals reversed this finding on the ground that such a connection existed by virtue of Nuodex' registration of Super Ad-it under the New Hampshire Economic Poisons Law (Appendix A, and see Part I of Argument *infra* in which we believe that we show that the statutory construction of the Court of Appeals on this point is conclusively erroneous).

other property, office, telephone listing, nor resident employees agents or representatives of any sort in The State of New Hampshire (R 84, 85, 100; DRA 18, 19, 100). No stocks of Nuodex goods are maintained in New Hampshire, and all sales are completed outside of the State (R 84; DRA 18). There is no evidence that Nuodex conducts or has ever conducted any regular or other corporate activities in the State (See R 103-105; DRA 97-99). Although it has registered to do business in the Commonwealth of Massachusetts, (R 88; DRA 22), it has never registered to do business in The State of New Hampshire and has appointed no agent there to receive service of process (R 85; DRA 19). Over the entire five year period of the record, it appears that only one Nuodex employee ever came into New Hampshire on business of the corporation. This was on the single date, April 8, 1953, more than two years before the complaint herein and in a matter wholly unrelated to it (R 103-105, 220; DRA 97-99, 154).

Nuodex' annual sales volume during the five years preceding the complaint varied between $9,500,000 and $8,000,000 (R 107, DRA 101). During this time its sales volume into The State of New Hampshire, moving through the channels of interstate commerce, varied from something in excess of $800 in 1951 to somewhat less than $3,500 in 1954. (Nuodex' Exhibit C, R 310; DRA 244; adjusted for testimony at R 283-285, 290-292; DRA 217-219 and 224-226). This was perhaps "two or three hundredths of a per cent of Nuodex' total sales." (R 107; DRA 101).

Nuodex does not, as a regular corporate activity, engage in direct customer solicitation in behalf of its products, and it has not done so in New Hampshire (R 75, 82; DRA 9, 16). Instead it has turned over the task of personal sales promotion and direct customer solicitation to seventeen independent manufacturers representatives in different areas of the country (R 75; DRA 9) and in its own organization it employs simply six regional sales managers (R 76; DRA 10) whose responsibility is essentially to see that the total results achieved in their respective territories are satisfactory (R 83, 119; DRA 17, 53).

D. H. Litter Company, Inc. (hereinafter sometimes referred to as Litter), a New York corporation having its main office in New York City and a branch office in Allston, Massachusetts (R 263; DRA 197) is Nuodex' sales representative for its New England territory (R 82; DRA 16). This territory includes

Maine, New Hampshire, Vermont, Massachusetts, part of Connecticut and part of New York (R 162; DRA 96). Litter receives compensation from Nuodex for its promotional efforts in the form of a five per cent commission on all sales of Nuodex products in the New England territory (See Nuodex-Litter representation contract, Plaintiff's Exhibit 2 at R 308-309; DRA 242-243). No one other than Litter personnel promotes Nuodex sales in New Hampshire (R 82; DRA 16).

Nuodex and Litter are distinct corporate entities. Nuodex has no financial interest in Litter (R 82; DRA 16), nor any control over it (R 82, 112, 166; DRA 16, 46, 100). Litter's customer call reports are its own internal company documents and Nuodex receives no copy of them (R 229; DRA 162). In addition to representing Nuodex, Litter also represents seven other manufacturers (R 82-83, 114; DRA 16-17, 45), and its business for them in New Hampshire is much greater than that for Nuodex (R 112; DRA 46).

The sole activity of Litter in behalf of Nuodex in New Hampshire has been a limited amount of direct customer solicitation and sales promotion (R 75-76, 286, 308-309; DRA 9-10, 200, 242-243). With the exception of two such visits to New Hampshire by one Cookingham (R 280; DRA 214), his only two visits to this State since he became Litter's Boston manager in 1958 (R 222; DRA 156), the only Litter employee who occasionally has solicited for Nuodex in New Hampshire is one Herbert Johnson (R 105; DRA 39) whose residence is in Andover, Massachusetts (R 89; DRA 23) and whose assigned territory for Litter includes southern New Hampshire, Vermont, Eastern New York State, Massachusetts north and west of Boston and western Connecticut. (R 113; DRA 47).

Under Litter's regular corporate practice, its soliciting personnel make a record of each call upon an account or prospect in the form of a so-called "call report." There is reproduced in the transcript the complete text of each of Johnson's call reports for the period in excess of five years from March 20, 1950 to May 5, 1955 upon any New Hampshire prospect or account to which at any time he mentioned Nuodex or its products. (R 313-328; DRA 247-262). The following report of a call on Nashua Corporation for September 22, 1953 is a sample which is illustrative of the nature of these reports:

Nashua Corp. 9-22-53

* * * *

Saw Mr. J. C. Tuttle—APA
Use Toluol (2000 mo.), Xylol (4000 mo.) and Textile Spts (will increase) all in drums. Putting in Tank form for T. T del. Wants second source. OK Will del. gal. samples of Toluol, Xylol, Super Petrolene, Super Troluoil and send data and price information.

Order Alcoa 552, Nuodex 84 and K-1717 as needed.

(R 322; DRA 256).

Only the words, "Nuodex 84," in this entire report indicate that the call was in some slight degree in the interest and behalf of this manufacturer. Examination of the entire file of reports will reveal that the foregoing is not untypical, and that as a general matter Johnson's activities in behalf of Nuodex in New Hampshire were essentially casual and incidental to his promotion activities with respect to Litter's more substantial accounts (See the reports at R 313-328; DRA 247-262, and testimony of Johnson at R 226-255, 259, 277-278; DRA 160-189, 193, 211-212. The names of Nuodex' products are listed in its Standard Products Price List, reproduced facing R 312; DRA 240). In appraising Johnson's testimony concerning these calls it is significant to note the repeated admonition of plaintiff's attorney that the witness respond to questioning solely in terms of Nuodex because he was "not concerned" with Litter's business for other manufacturers (R 91-92, 229, 241; DRA 25-26, 163, 175).

That Johnson's representation of Nuodex in New Hampshire was casual and incidental is also strongly indicated by certain financial data. Johnson testified that Nuodex' share of Litter's total New Hampshire business was small (R 112; DRA 46). How small it was can be readily established. Computed on the basis of five per cent of Nuodex sales into New Hampshire (Defendant's exhibit C at R 310; DRA 244), Litter's aggregate commissions on sales of Nuodex products in New Hampshire over the entire five-year period were $407.32, or an average of approximately $80.00 per year. Manifestly, business in the entire jurisdiction of this order of magnitude neither reflects, nor

[1] Denotes omitted caption

would justify any substantial travel or time of soliciting personnel.

Johnson's call reports also provide a record of the frequency, or lack of frequency, with which he was present in New Hampshire in some way promoting the interest of the nonresident defendant. Thus, the reports show that although Johnson made a number of calls in this State between December 16, 1953 and July 13, 1954 (R 322-325; DRA 256-259), during this entire seven-month period he made no single call in which Nuodex or any of its products was promoted. Over the five years of the call report record, Johnson appears to have mentioned Nuodex or its products to New Hampshire prospects or customers on a total of at most thirty-two different days. If it be assumed that Johnson spent the whole of each of these working days in New Hampshire (which is almost certainly not the case) and that his total time throughout each day was equally divided among the products of each of the eight different manufacturers represented by Litter, it would result that *over the entire period of this record Johnson spent the equivalent of four working days for Nuodex in the jurisdiction. This is an average of less than one day in the State each year.* Even if the premise of the foregoing estimate be doubled on the theory that the call reports support the hypothesis that on these days Johnson devoted one-quarter of his sales efforts to the interests of this manufacturer, the result would be a total of only eight equivalent working days in the jurisdiction over the five-year period, or still an average of less than two working days there for Nuodex each year.

Among Nuodex products since 1950 has been a paint additive to inhibit the development of paint mildew (R 186; DRA 120). The original product was designated as Ad-it, but in 1952 this was succeeded by a new formula designated as Super Ad-it, (R 186; DRA 120) which is the paint ingredient complained of in this action. Prior to 1954 Super Ad-it was sold through Nuodex' regional sales representatives to paint manufacturers

1950: March 20, May 4, June 14, August 16, September 27;
1951: May 10, August 20 and 21, October 15 and November 20;
1952: February 26, June 11, July 10 and August 20;
1953: February 10, March 9 and 26, May 28, June 3, July 7, August 13 and 31, September 22, November 10 and December 16;
1954: July 13, September 22, October 5 and November 1;
1955: January 4 and 12, March 17

such as King and to certain of their designated distributors in prepackaged bottles for distribution to the ultimate consumer as well as in bulk for use by paint manufacturers in paint formulas. In the spring of 1954 Nuodex entered into an arrangement with Doggett-Pfeil Laboratories, Incorporated, a distinct corporation in which Nuodex has no ownership interest and over which it has no control (R 176-177, 191, 205; DRA 110-111, 125, 139) whereby the latter acquired the exclusive right to sell prepackaged Super Ad-it (R 177; DRA 111 and extracts from plaintiff's exhibit 19 at R 311-313; DRA 245-247), purchasing the product in bulk from Nuodex and repackaging it in small bottles. Nuodex itself has continued to sell the product in bulk.

There is no evidence that Nuodex ever sold either Ad-it or Super Ad-it in bulk to any New Hampshire customer. Prior to the Doggett-Pfeil contract Nuodex made two or three isolated sales of a half dozen bottles or so each of the prepackaged product to New Hampshire customers (R 139, 188-190, 278, 282-283; DRA 73, 122-124, 212, 216-217), but there is no evidence of any such sale since. Neither is there evidence of any such sales to New Hampshire accounts directly by Doggett & Pfeil.

The record discloses the following additional facts. Nuodex has a card file mailing list of possible customers to which it occasionally sends out promotional materials. This file includes twenty-eight drawers, each eighteen inches deep, filled with cards, but only ten cards in the entire file bear New Hampshire addresses and one of these is no longer active (R 149, 160-163, 293-295; DRA 83, 94-97, 227-229).

Nuodex admits that it advertises periodically in several nationally circulated trade journals (R 145, 156-157; DRA 79, 90-91) but it has never engaged in local advertising of its products in The State of New Hampshire (R 145, 266; DRA 79, 200). From time to time it has received at its offices outside of the State of New Hampshire correspondence and inquiries from possible New Hampshire accounts. It is admitted that Nuodex has answered this correspondence and that from time to time it has sent samples of its products to New Hampshire prospects. Nuodex further admits that it has registered its products which require registration under the Economic Poisons Acts of all of the states (R 192; DRA 126), including the relevant statute of The State of New Hampshire (New Hampshire RSA 438, repro-

duced in Appendix C *infra* at 70-80.) It has done this because it believes that its ". . . customers such as Sears are apt to sell in any state, and we want to protect our customers" (R 192; DRA 126).

The foregoing recapitulation sets forth the major facts upon which the issue of jurisdiction herein must turn. In truth, there is and has been little real dispute among the parties on these matters, the issues having rather been drawn between them as to their jurisdictional significance or want of significance. Upon a correct application of legal authority, Petitioner respectfully submits that the Supreme Court will find that the judgments of the Court of Appeals sustaining jurisdiction over petitioner herein should be reversed and that the order of the District Court quashing the return and dismissing the action should be reinstated. We turn now to state to the Court the reasons why Petitioner believes writs of certiorari should be allowed herein.

(h) ARGUMENT

Introductory

This Argument is respectfully submitted for the purpose of setting forth the reasons relied upon by Petitioner for allowance of writs of certiorari herein. We do not conceive it to be the function of a Petition for Certiorari to develop a conclusive case as to the error of the judgment of which review is sought. While we believe that we show herein that such error occurred, we defer full Argument to this effect until such time as a brief upon the merits of the jurisdictional question herein at issue may be in order.

I. THE COURT OF APPEALS HAS COMMITTED A SERIOUS ERROR IN CONSTRUCTION OF AN IMPORTANT STATE STATUTE IN FINDING A CONNECTION OF JURISDICTIONAL SIGNIFICANCE BETWEEN PLAINTIFF'S HARM AND NUODEX' REGISTRATION OF SUPER AD-IT UNDER THE NEW HAMPSHIRE ECONOMIC POISONS LAW.

§ 1. Nature of Error.

The District Court decision that it was without jurisdiction as to the person of the petitioner herein was based in large

measure upon its finding that the injury complained of was in no way connected with any activity by or for petitioner in The State of New Hampshire. For the Court conceived it to be an essential element of the *International Shoe*[6] doctrine of state jurisdiction over a foreign corporation, particularly as that doctrine is conceived and applied by the Supreme Court of New Hampshire, that there exist a relation between the subject matter of the claim and some local contact of the foreign corporation. (Appendix B *infra* at 57.) In the Court of Appeals both Judge Hartigan and Chief Judge Magruder recognized that in the context of all of the facts of this case it was important to the existence of local jurisdiction over petitioner that a connection exist between local activity by or for petitioner in New Hampshire and the facts giving rise to plaintiff's claim. But each believed such a connection was supplied by Nuodex' act of registration of its product, Super Ad-it, under the New Hampshire Economic Poisons Law. Thus, Judge Hartigan observed:

> "It seems that without such registration Super Ad-It could not be sold legally in New Hampshire even in a 'mixture of substances,' such as King's paint. See N. H. Rev. Stat. Ann. c. 438, §1 (1955). Therefore, the damage occasioned by its shipment into New Hampshire by King was connected with and arose from activity by Nuodex in New Hampshire in the sense that if Nuodex had not registered the product, and in the absence of other registration, the product could not have legally entered New Hampshire and the suit would not have arisen." (Appendix A *infra* at xx)

And to the same effect, Chief Judge Magruder states:

> "This sale (of King's greenhouse paint, containing Super Ad-it, to the plaintiff) was rendered lawful under the New Hampshire law only because Nuodex had registered its poisonous chemical under the New Hampshire Economic Poisons Act." (Appendix A *infra* at xx; parenthesis supplied.)

We respectfully submit with due deference for the Court of Appeals, that upon analysis both of the foregoing quotations will be found to set forth clear and manifest error.

[6] 326 US 310, 90 L. Ed. 95 (1945)

In the first place, we suggest that in terms of logic and policy, it is error to find a link of jurisdictional significance between plaintiff's harm and the Petitioner by reason of Petitioner's local registration of its product, Super Ad-it. Had Petitioner failed to register, this link would have been missing and jurisdiction would have failed. But if jurisdiction might have been avoided by Petitioner's failure to register its product in accordance with the statute, should it be penalized for precautions it took to comply with the law? This was simply a product registration with the New Hampshire Commissioner of Agriculture to permit lawful interstate shipments into the state. It was in no sense a registration by a foreign corporation for purposes of doing local business in New Hampshire. Under the reasoning of the majority of the Court of Appeals, Petitioner would have been better off to have ignored the New Hampshire Economic Poisons Law. In truth, the legality of the entry of King's paint into New Hampshire has no logical connection with plaintiff's injury, for the same injury might have occurred if the entry had taken place unlawfully (assuming as the reviewing judges did, that its entry was in fact lawful).

Even accepting, however, the illogical premise that registration by Nuodex to permit King's paint to be sold legally in New Hampshire would establish a local connection between Petitioner and plaintiff's harm, the Court of Appeals has committed clear error in concluding that any registration which was in fact made by Petitioner in any way legalized King's local sales. On the contrary, careful reading of the New Hampshire Economic Poisons Law can lead but to a single conclusion, to wit, that Petitioner's registration of Super Ad-it had absolutely no effect whatsoever upon the legality of King's sale of its unregistered greenhouse paint in the jurisdiction (albeit King's paint contained registered Super Ad-it). Hence Nuodex' registration had no connection with plaintiff's claimed harm.

The New Hampshire Economic Poisons law sets forth in Subsection I of its first section the following definition:

> RSA 438:1 I. "The term 'economic poison' means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents,

The statute is set forth *verbatim* and in its entirety in Appendix C *infra*.

> fungi, weeds, or other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the commissioner shall declare to be a pest."

Section 2 makes it unlawful to sell or distribute unregistered economic poisons (438:2 I (1)) and imposes certain labeling requirements (438:2 I (2)).

Section 3 provides for registration and includes the proviso:

> "Provided, that products which have the same formula, are manufactured by the same person, the labeling of which contains the same claims, and the labels of which bear a designation identifying the product as the same economic poison may be registered as a single economic poison. . . ." (RSA 438:3).

Section 5 prescribes information required to be filed in connection with registration. Sections 4 and 13 provide certain exceptions and exemptions from some or all provisions of the Act, but none as to products which contain duly registered economic poisons as ingredients.

We submit that if King's greenhouse paint was an economic poison within the meaning of Section 1 of the statute, its distribution and sale in New Hampshire without registration was illegal under section 2, and the fact that Nuodex had registered Super Ad-it in no way validated it. Nuodex submitted no formula, no labels, no registration with respect to greenhouse paint. Therefore Nuodex' registration of its product had no connection with Elliott's harm from the use of a different and unregistered product of a different manufacturer. This must be the case unless King's greenhouse paint be regarded as the identical economic poison as Nuodex' Super Ad-it. But section 3 of the statute defeats such a construction for it restricts the concept of identical economic poisons to those having the same formula, manufactured by the same person, and bearing labels asserting the same claims. Nor is there any other exception or exemption anywhere in the Act, which applies to economic poisons containing duly registered economic poisons as ingredients.

Construction of the statute to require registration of King's paint, if it was an economic poison, without regard to whether or not Nuodex had registered Super Ad-it, an ingredient of the

paint formula, is not only clearly suggested by the literal text of the act, but is also necessary to accomplish its underlying purposes. If it were held that local registration by a foreign manufacturer of an ingredient relieves from any further duty of registration the manufacturer of a compound containing the ingredient, the statutory scheme to protect New Hampshire purchasers by control over the labeling, ingredients statements and claims with respect to products actually offered for sale to them would be destroyed.

It follows from the foregoing that, contrary to the holding of a majority of the Court of Appeals, Nuodex' act of registration of Super Ad-it did not render lawful the local sale of King's unregistered greenhouse paint, and hence this registration provided no connection between local activity of Nuodex in New Hampshire and plaintiff's claimed harm. On the one hand, if the paint was indeed an economic poison,[7] then its distribution and sale by King in New Hampshire without registration was just as unlawful as though Nuodex had never registered Super Ad-it. On the other hand, if it was not an economic poison, then equally clearly, there was no connection between Nuodex' registration of Super Ad-it and Elliott's harm for in this event *no* local registration was necessary to permit lawful local sales of King's paint even though it did incorporate Super Ad-it.

§2. Importance of Review

The importance of the issue presented to the Supreme Court in connection with the ground for review asserted in this section of this Argument lies in the fact that the New Hampshire statute in question is by no means unique. The great majority of the states of the Union have adopted economic poisons laws more or less similar to that of New Hampshire,[8] and many more have

[7] And presumably it was a product which inhibted mildew, a paint fungus.

[8] The following citations refer to economic poisons laws in the states indicated:

Code of Ala. (1940), (1955 Supp.), Title 2, Sec. 337 (1) *et seq.*; Ariz. Rev. Stat. Ann., Secs. 3-341 *et seq.*; Ark. Stat. 77-201 *et seq.*, as amended; Deerings Cal. Codes, Agricultural, Division 5, Ch. 7, Secs. 1061 *et seq.*, as amended; Col. Rev. Stat., Ch. 6, Art. 12; Gen. Stat. of Conn. (1949), Title 30, Ch. 30, Secs. 3999 *et seq.**; Fla. Stat., Ch. 487; Ga. Code (1933), Part V, Chs. 5-15; Rev. Laws of Hawaii (1945), Ch. 18A, Secs. 1180-1 *et seq.*, as amended; Smith-Hurd Ann. St. (Ill.), Ch. 38, Sec. 187*; Code

other legislation which is similar in its use of the statutory scheme of prohibiting local distribution or sale of particular types of products in the jurisdiction without their prior registration with some designated state agency.[10] It must be expected that from time to time claims will be brought in these jurisdictions for harm allegedly incurred by plaintiffs as a result of the use of compounds which should have been registered and that in some of these cases there will be issues of personal jurisdiction over foreign corporate manufacturers of such compounds and their ingredients. Under recognized due process authority at the present time, an important standard to be considered in weighing local

of Iowa (1954), Chs. 189 & 206*; Gen. Stat. of Kans., Ann., 2-2201 *et seq.*, as amended; Ky. Acts of 1956, Ch. 218, amending Ky. Rev. Stat. 247.540 *et seq.*; La. Rev. Stat. (1954 Supp.), Secs. 1601 *et seq.*; Rev. Stat. of Maine, Ch. 32, Secs. 208, 213 & 287, *et seq.*; Ann. Code of Md. Title 48, Secs. 134 *et seq.*; Mich. Public Acts of 1949, No. 297; Minn. Stat., 24.072 *et seq.*; Miss. Code Ann. (1954 Supp.), Secs. 5000.01 *et seq.*; Vernon's Ann. Mo. Stat. (1956 Supp.), Secs. 263.70 *et seq.*; Rev. Codes of Mont., 27-201 *et seq.*; Nev. Rev. Stat., Chs. 586.010 *et seq.*; N. H. RSA Ch. 438; N. J. Stat. Ann. (1956 Supp.), Title 4, Ch. 8A; New Mex. Stat. Ann., Secs. 45-9-1 *et seq.*; N. Y. Agriculture & Markets Law, Secs. 148 *et seq.**; Gen. Stat. of N. C., Secs. 106-51 *et seq.*, as amended; N. D. Rev. Code of 1949 (1955 Supp.), Ch. 19-18; Okla. Stat. (1955 Supp.), Title 2, Secs. 3-61 *et seq.*; Ore. Rev. Stat., Ch. 634; Purdon's Penn. Stat. Ann., Title 3, Ch. 3, Secs. 101 *et seq.*, as amended; R. I. Public Laws of 1951, Ch. 2832, as amended by Public Laws of 1952, Ch. 3008; Code of Laws of S. C. (1956 Supp.), Secs. 3-187 *et seq.*; S. D. Code of 1939 (1952 Supp.), Ch. 22.12A, as amended; Tenn. Code Ann., Secs. 43-201 *et seq.*; Vernon's Tex. Stat. (1948), Title 4, Ch. 7A, Art. 4235b, as amended; Utah Code Ann. (1953), Secs. 4-4-16 *et seq.*; Vermont Stat. (1947), Ch. 216; Code of Va. (1950), Secs. 3-198 *et seq.*; Rev. Code of Wash., Ch. 15.56; Wisc. Stat. (1955), Secs. 94.67 *et seq.*; Wyoming Comp. Stat. Ann. (1945), Sec. 46.1201 *et seq.*, as amended; Rev. Stat. of Canada (1952), Ch. 209.

*Indicates registration not required.

[10] For example, under the Sanitary Production and Distribution of Food Act of The State of New Hampshire, it is provided in part:

"RSA 143:13 Registration by Nonresident Vendors. No beverage or beverage concentrate, for retail sale, manufactured out of the state, shall be sold or offered for sale within the state unless the same has first been registered by the manufacturer thereof or by his agent with the state board of health. * * *"

Does registration under such a statute by the foreign corporate manufacturer of a concentrate provide a local connection between it and harm suffered by a New Hampshire consumer of an unregistered mixture which incorporates the concentrate as an ingredient when the mixture was manufactured outside of the state by a different manufacturer and was sold locally without registration? The Court of Appeals' decision in the present cases is authority that it does.

jurisdiction over the person of a foreign corporation is whether or not the harm complained of arose from or is connected with the defendant's local activities. *International Shoe Company* v. *Washington*, 326 U. S. 310 at 319-320, 90 L. Ed. 95 at 104 (1945). The decision of the Court of Appeals in the present cases in effect eliminates this standard from the *International Shoe doctrine* in a fact situation which there is no reason to think will be unique to this case but rather must be expected to recur. Under these circumstances, the decisions herein should not be allowed to stand as authorities in view of the manifest error upon which they are based, but certiorari should issue for their review.

II. THE DECISION OF THE COURT OF APPEALS HEREIN, IF NOT IN ACTUAL CONFLICT WITH SUPREME COURT AUTHORITY, IS SUCH A MAJOR EXTENSION OF THE LAW OF JURISDICTION OVER FOREIGN CORPORATIONS AS HERETOFORE DECLARED BY THE SUPREME COURT THAT A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THIS JUDGMENT.

§1. Leading Supreme Court Authority as to "due process" limits of jurisdiction over foreign corporations.

The modern "due process" limits of jurisdiction of the courts of a state over foreign corporations were declared by the Supreme Court of the United States in *International Shoe Co.* v. *Washington*, 326 U. S. 310, 90 L. Ed. 95 (1945) and have been clarified and explained in such subsequent cases as *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643, 94 L. Ed. 1154 (1950) and *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 96 L. Ed. 485 (1952). In the *International Shoe* case, the ultimate "due process" test of whether a foreign corporation was doing business locally in such manner as to be subject to the jurisdiction of the state court was declared to be whether the local maintenance of the action was consistent with "traditional notions of fair play and substantial justice." (90 L. Ed. 95 at 102). The Court undertook to suggest certain standards to be taken into account in weighing fairness. It said:

"Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact. Klein v. Tax Supers, 282 U. S. 19, 24, 75 L. ed 140, 143, 51 S Ct 15, 13 ALR 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. * * *

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. * * *

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances hardly be said to be undue. * * *

"Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. * * * " (90 L. Ed. at 102, 103, 104).

What is the teaching of this language of the Court? What is the meaning of such phrases, as "systematic and continuous activities," a "large volume of business," and the enjoyment of the "benefits and protection" of local law? In the context of the

case before the Court this language referred to a foreign corporation which the evidence showed had regularly maintained a full-time resident sales force of eleven to thirteen of its own employees in the jurisdiction. Here, living and working in Washington, their "regular and continuous" activities had earned for them commissions of more than $31,000 per year and the volume of sales by the defendant must have run into hundreds of thousands of dollars. Here defendent had from time to time rented show rooms for demonstrations of its products in the state. In so conducting its local operations through its agents, defendant had indeed enjoyed substantial benefits and protection of local laws. And the claim asserted against the foreign corporation was by the State and in the exercise of its taxing power as to obligations arising from the very activities of defendant's own employees in defendant's behalf in the jurisdiction. (90 L. Ed. 95 at 100-101.)

Contrast all of the above with the facts in the present cases. Here, only a salesman representing Nuodex as well as seven other manufacturers whose business was much more important to him (*supra* at 7) could be said to have been in the jurisdiction at all repetitively for Nuodex, and the evidence of his call reports is clear that he came but occasionally and often did nothing for Nuodex. (*Supra* at 7-9). His selling time in New Hampshire for Nuodex was at most a day or two a year (*supra* at 8-9). Here, in contrast to the "large volume of business" of the *International Shoe* case, Nuodex' annual sales into New Hampshire averaged less than $2,000 and Litter's annual commissions have been less than $100 (*supra* at 8). Nuodex has had no property in New Hampshire to enjoy the benefits and protection of local law, nor did its personnel or it in its corporate activities enjoy any such benefits (*supra* at 5-6). Its registration under the New Hampshire Economic Poison Act (RSA 438, Appendix C *infra* at 70) of certain of its products, some of which apparently were never shipped into the State, to avoid risk of criminal liability for itself and its customers in the event of casual sales there is certainly not the kind of enjoyment of the general benefits and protection of local law which bears upon the question of the fairness of sustaining local jurisdiction over a foreign corporation. Finally, the complaint herein is a private complaint which the District Court correctly found has no connection whatsoever

with any activity by or for Petitioner in the jurisdiction" in contrast with the *International Shoe* complaint which was founded upon an application of the taxing power of the State of Washington to defendant's very local activities.

Can it be said that "traditional notions of fair play" contemplate compelling a nonresident corporation such as petitioner to defend this sort of action in a foreign jurisdiction with which its contacts have been as insubstantial and occasional as those of Nuodex with New Hampshire? We respectfully believe that it cannot and that the standards of the *International Shoe* case so dictate. When *International Shoe* was decided, it was viewed as laying down a liberal rule of jurisdiction. But that case as contrasted with this is as black against white.

Perkins v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 96 L. Ed. 485 (1952) is also instructive of the Supreme Court's conception of such continuous, systematic and substantial activities of a foreign corporation in a jurisdiction as will suffice under modern law of due process, to support service of process upon it there. The issue before the Supreme Court was whether it was indispensable to local jurisdiction over a foreign corporation under the due process clause of the Fourteenth Amendment that the subject of the claim be related to defendant's local activities. Holding that this was not an indispensable jurisdictional condition in every case, the Supreme Court said:

> "The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. Appropriate tests for that are discussed in International Shoe Co. v. Washington, supra . . . . The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case. The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test." (96 L. Ed. 485 at 492.)

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[11] Although the Court of Appeals erroneously found such a connection. See Part I of this Argument *supra*.

The Court then turned to the narrow question as to whether Benguet could be held to defend in Ohio as to a cause of action unrelated to its local activities.

> "It remains only to consider, in more detail, the issue of whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was *sufficiently substantial* and of such nature as to *permit* Ohio to entertain a cause of action against a foreign corporation where the cause of action arose from activities entirely distinct from its activities in Ohio." (First emphasis supplied. 94 L. Ed. 485 at 493.)

The Court sought the answer in the evidentiary facts of the case which it recounted in detail as follows:

> "* * * The company's mining properties were in the Philippine Islands. Its operations there were completely halted during the occupation of the Islands by the Japanese. During that interim the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio. There he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and to its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Phillippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company. He there discharged his duties as president and general manager, both

during the occupation of the company's properties by the Japanese and immediately thereafter. While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that state at the time he was served with summons. * * * (U)nder the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding." (96 L. Ed. 485 at 493-494.)

The *Perkins* case, like *International Shoe*, can be of small comfort to respondents herein. Again, in it the meaning which the Supreme Court has heretofore attached to continuous, systematic and substantial activities in the jurisdiction is revealed by the quoted recitation of underlying evidentiary facts. Again, by contrast with it, the insubstantial, occasional and tenuous nature of Nuodex' contacts with New Hampshire for purpose of jurisdiction is manifest.

See also *Travelers Health Assn. v. Virginia*, 339 U. S. 642, 94 L. Ed. 1154 (1950) where the issue was as to the jurisdiction of the State of Virginia over a foreign mail order insurance company in an action brought to effectuate the public policy of the state as to registration and regulation of such enterprises. In sustaining jurisdiction the Supreme Court noted the volume and extent of defendant's local business promoted in Virginia by Virginians, the continuing nature of the relations which its insurance contracts created, the regular commission of local acts in its behalf as by the investigation of losses, and the relation of the subject of the proceeding to defendant's local contacts and activities (94 L. Ed. at 1160, 1161). Again in this authority the clear implication of the reasoning of the Supreme Court in its discussion of relevant jurisdictional facts is that local jurisdiction over a foreign corporation depends upon far greater contacts with the state than Nuodex has had with New Hampshire.

§2. The Court of Appeals opinions herein differ among themselves, and two of the three are novel applications of the International Shoe doctrine.

Each of the judges who considered these cases in the Court of

Appeals concluded that the fundamental issue which they pose is as to the scope of the power of a New Hampshire court over the person of Nuodex under the due process clause with respect to these claims. Each agreed with the others that this issue was governed by the doctrine of the *International Shoe* case, and each concurred in the result that New Hampshire did have jurisdiction. No one of the reviewing judges, however, agreed with any one of the others as to the reasoning by which he arrived at his result. Judge Hartigan apparently felt that the evidence met all of the standards of *International Shoe*, including the necessary quality and nature of defendant's local activities (Appendix A *infra* at 51-52 9-11) as well as a connection between the injury complained of such local activities. Chief Judge Magruder was more cautious in his statement of the proper doctrines of law applicable to the evidence. He said:

> "[T]he manifested activities within the state by a foreign corporation may amount to a 'doing business' of so continuous and systematic a nature as reasonably to permit the state to subject the foreign corporation to service of process with respect to any cause of action, wheresoever arising. On the other hand, a much lesser manifestation of activity within the state may, consistently with due process, justify a state to exercise personal jurisdiction over the foreign corporation, sued on a cause of action having some connection with or arising out of those activities within the state." (Appendix A *infra* at 53.)

He then expressed doubt that the underlying facts of the case at bar would suffice to make out that Nuodex was doing business of "so continuous and systematic a character" as to be subject to the personal jurisdiction of the state as to any and all causes of action. But the present cause of action he thought to be related to Nuodex' local activity since:

> "This sale (by King to Plaintiff) was rendered lawful under the New Hampshire law only because Nuodex had registered its poisonous chemical under the New Hampshire Economic Poisons Act." (Appendix A *infra* at 54.)

Conter Part 1 of this Argument *supra* for reasons why we believe this latter conclusion was error.

See note 11 *supra*.

And he agreed in the result that jurisdiction should be sustained Judge Woodbury adopted still a different view. Apparently regarding the standards of fairness set forth in the *International Shoe* case as inapplicable to the particular case at bar, he proposed a new "conflict of interest" test:

> "I suggest that application of the test of 'fair play and substantial justice' calls for reference to the specific interests in conflict in each particular case. Thus in this case I think we should weigh on the one hand the legitimate interests of the state, 1) in providing local access to compensation for wrongs done to its citizens, and, 2) in regulating potentially harmful activity within the state, as against, on the other hand, the legitimate interests of the foreign corporation relative, 1) to its reasonable expectations as to the laws and liabilities to which it was subjecting itself, and, 2) to its opportunity to defend itself without undue expense and inconvenience." (Appendix A at 56.)

Clearly, the above is a substantial departure from the standards of fairness heretofore laid down by the Supreme Court for the guidance of inferior tribunals in their administration of the *International Shoe* doctrine.

§3. Importance of review

Petitioner respectfully submits that the judgment of the Court of Appeals hereinbelow manifestly sanctions an assertion of state court jurisdiction substantially beyond the bounds heretofore suggested by applicable Supreme Court authorities. In doing so, each of the members of the Court of Appeals has applied the doctrine of the *International Shoe* case to the facts in a different manner, and Judge Woodbury, indeed, has utilized an entirely new set of standards by which to implement its rule of fairness.

Petitioner respectfully submits that certiorari should issue for review of the *holding* of the Court of Appeals herein because this holding is at odds with the indications of existing Supreme Court authority in that by the standards of such authority petitioner's local contacts with New Hampshire were not of a jurisdictional "quality and nature" and were not systematic, continuous and

substantial; and further because the issue involved is a litigious one likely to recur in future litigation.

Petitioner further respectfully suggests that there is an unusual but important technical reason for the Supreme Court to exercise its supervisory power over the lower courts by directing that certiorari issue herein for review of the judgments of the Court of Appeals below. This is the diversity of reasoning employed by the several reviewing judges of the Court of Appeals in arriving at their conclusion that jurisdiction of the District Court over the person of the petitioner should be sustained. The result of this diversity of reasoning is that in the present posture of these cases the law of the First Circuit as to the "doing business" issue has become uncertain. In his "conflict of interest" test of the fairness of sustaining jurisdiction over a foreign corporation, Judge Woodbury suggests as one of the criteria of fairness the corporation's ". . . reasonable expectations as to the laws and liabilities to which it was subjecting itself . . ." (Appendix A, *infra* at page 56.) Certainly under our Anglo-American legal system reasonable predictability of the law is accepted as of vital importance. But by what standards is a nonresident corporation to form its expectations as the laws and liabilities to which it may be subject in the First Circuit? Is it to understand, in accordance with Judge Hartigan's opinion, that contacts such as Petitioner had with New Hampshire are of such quality and nature and are so systematic, continuous and substantial as to support jurisdiction generally as to any and all causes of action? Or should it understand that such contacts are generally insufficient unless an action happens to arise from a particular local contact, as Judge Magruder suggests? Or, finally, should it understand that in the First Circuit the standards of jurisdiction suggested in the *International Shoe* opinion are no longer determinative, but that jurisdiction is to be determined in each case according to the way in which a reviewing court happens to weigh the particular conflicting interests which the case presents. With deference to the Court of Appeals for the First Circuit, petitioner respectfully suggests that the Supreme Court may properly and wisely direct that certiorari issue herein in order that these

[1] See Part IV, Section 2 of this Argument *infra* for a partial listing of cases simply since 1950 involving questions of jurisdiction over foreign corporations in fact situations analagous to those of the present cases.

quesions shall not remain unanswered but that the law in point may be clarified and reasonable predictability restored to it.

III. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF NEW HAMPSHIRE LAW CONTRARY TO THE APPLICABLE AUTHORITIES OF THE LAW OF THE STATE IN HOLDING THAT THE NEW HAMSHIRE LAW OF JURISDICTION OVER FOREIGN CORPORATIONS KNOWS NO LIMITS OTHER THAN THOSE OF FEDERAL DUE PROCESS.

§1. These cases present an issue of state law.

In a diversity case in which there is raised the issue of the jurisdiction of the District Court over the person of a foreign corporation on the ground that it is not "doing business" locally, the resulting jurisdictional inquiry must be upon two levels: first, the level of state law, and second that of federal constitutional law. The state law issue arises in the following manner. According to the federal venue statute:

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.* * *
>
> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." (28 U.S.C.A. §1391.)

The present proceeding being a diversity action brought in New Hampshire against Nuodex, a New York corporation not licensed to do business in New Hampshire, the foregoing statute will suffice as authority to try the action in the District Court for New Hampshire only if Nuodex was in fact "doing business" locally. Under the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), the question of whether a foreign corporation is "doing business" within a state is to be tested by the law of the jurisdiction. See *Lone Star Package Car Co.* v.

Baltimore & O. R. Co., (C.A. 5th Cir., 1954), 212 F. 2d 147 at 153n; and *Kenny v. Alaska Airlines*, (S. D. Calif., 1955) 132 F. Supp. 838 at 843-849 where this issue is fully discussed and many authorities cited.

The several opinions filed herein by the reviewing judges of the Court of Appeals agree in recognizing that the sufficiency of the jurisdiction of the District Court over the person of the Petitioner must be tested by the standards of New Hampshire law as well as by those of the law of due process. In the main opinion of Judge Hartigan, however, this issue is disposed of by his conclusion that even if New Hampshire law imposes any more rigorous standards of jurisdiction than those of the federal law of due process, the evidence showed that any such standards were met in the present cases. (Appendix A *infra* at 50-51.) The two concurring opinions are more cautious as to the evidence but more liberal in their construction of the scope of the New Hampshire law of jurisdiction: each construes this law to place no narrower restrictions upon the jurisdiction of the State courts than those of federal due process, however expansive the bounds of due process may be. Neither therefore makes further inquiry as to the sufficiency of the jurisdictional facts herein under any standards of state law more limited than those conceived by the reviewing judge to be appropriate to the law of due process.

We submit that this was error. For we believe that there is a body of New Hampshire law on the issue of local jurisdiction over foreign corporations which the Court of Appeals should have considered. If it had, it would have found that this law imposes a test of systematic, continuous and substantial local contacts as well as one of a relation of the claim to some such local contact of the foreign corporation. Correct application of this New Hampshire law of jurisdiction to the facts of these cases

The issue of the sufficiency of the foreign corporation's local activities to constitute doing business under local law also arises under Rule 4 (d) (3) and 4 (d) (7) of the *Federal Rules of Civil Procedure* wherein provision is made for service of the summons and complaint "being there in fact provided that in an action against a foreign corporation

> it is also sufficient, if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." (Rule 4 (d) (7).)

would have resulted in a contrary judgment in the Court of Appeals to that actually entered.

In the recent case of *LaBonte* v. *Company*, 98 N. H. 163 (1953), the Supreme Court of New Hampshire remarked with reference to the issue of state court jurisdiction over a foreign corporation:

> "While many of the persuasive authorities cited are federal cases, the issue to be decided is one of state law." (98 N. H. 163 at 166.)

There is, therefore, an independent test of state law to be considered. The test of jurisdiction under this state law, however, is closely related to federal law of due process, for the New Hampshire Court speaks of it as the test of the *International Shoe* case. *Grace* v. *Company*, 95 N. H. 74 at 77, (1948); *Taylor* v. *Klenzade Products, Inc.*, 97 N. H. 517 at 519 (1952); *LaBonte* v. *Company*, 98 N. H. 163 at 167-168 (1953). More precisely, however, it is the doctrine of the *International Shoe* case as that doctrine has been construed, applied and approved by the Supreme Court of New Hampshire.

We are aware of nothing in any opinion of the New Hampshire Supreme Court which declares, or in any way suggests, the open-ended rule of jurisdiction announced by the majority of the Court of Appeals, to wit, that New Hampshire statutory jurisdiction, properly construed, extends to the ultimate bounds of due process, no matter how expansively those bounds may be set and without regard to whether they are fixed in accord with the law of the *International Shoe* case or otherwise.[10]

Judge Woodbury cites *Campbell* v. *United States Radiator Corp.*, 86 N. H. 310 (1933) and *Grace* v. *Proctor & Gamble Co.*, 95 N. H. 74 (1948) as indicating ". . . unmistakably that in New Hampshire foreign corporations are subject to local jurisdiction up to the limits imposed upon state action by the due process clause of the Fourteenth Amendment." (Appendix A *infra* at

[10] Note that such a rule entirely disregards, without consideration, the possibility that the Constitution of the State of New Hampshire might be construed to fix more restrictive bounds of jurisdiction over foreign corporations than the most liberal possible ultimate construction which may be given the due process clause of the Fourteenth Amendment by the Supreme Court of the United States.

55.) But it is difficult to see how the authorities cited support the inference. The *Campbell* case involved a holding that under the prevailing law of due process, jurisdiction of the nonresident corporate defendant was wanting; and *Grace* involved simply an instruction to the trial court that the correct test of jurisdiction is that stated in *International Shoe*. Neither case included any discussion of the scope and meaning of the New Hampshire jurisdiction statute. The two more recent New Hampshire cases on the point at issue have simply reaffirmed that the test of jurisdiction is to be found in the principles of the *International Shoe* case. (*Taylor* v. *Company*, 97 N. H. 517 at 519 (1952); *LaBonte* v. *Company*, 98 N. H. 163 at 167 (1953). Again, neither has suggested that jurisdiction under New Hampshire law is open-ended and extends in any degree beyond the bounds heretofore approved by the Court.

§2. NEW HAMPSHIRE LAW IMPOSES A JURISDICTION REQUIREMENT OF SYSTEMATIC, CONTINUOUS AND SUBSTANTIAL LOCAL ACTIVITIES BY THE NONRESIDENT AS WELL AS A RELATION OF THE CLAIM TO SUCH LOCAL ACTIVITY.

If the proper standards of the New Hampshire law of jurisdiction over foreign corporations are indeed those of *International Shoe, supra*, as understood and construed by the New Hampshire Court, the decision of the Court of Appeals herein is contrary to such declared law. A key criterion of jurisdiction under the rule of the *International Shoe* case, recognized in New Hampshire (*Taylor* v. *Company*, 97 N. H. 517 at 519, 520-521; *LaBonte* v. *Company*, 98 N. H. 163 at 167) as well as elsewhere, is whether the defendant corporation is "systematically and continuously" engaged in persuit of its business interests in the jurisdiction.

The Supreme Court of the United States gave a suggestion as to the meaning of this phrase in *Perkins* v. *Benguet Etc. Co.*, 342 U.S. 437, 96 L. Ed. 485 (1952) when it said:

> "The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case. The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a

> license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test." (342 U. S. 437 at 445, 96 L. Ed. 485 at 492.)

In *LaBonte* v. *Company*, 98 N. H. 163 (1952) the Supreme Court of New Hampshire indicated its practical understanding of this language:

> "While the concept of doing business is a legal one, it should bear some relation to the concept of doing business in a commercial sense." (*LaBonte* v. *Company*, 98 N. H. 163 at 167.)

The jurisdictional criteria of systematic and continuous local activities having a relation to the subject of the claim have been expressed in each of the two recent New Hampshire cases on the "doing business" issue. *In Taylor* v. *Company*, 97 N. H. 517 (1952), the Court said:

> "One of the criteria (of jurisdiction under the *International Shoe* case) is whether the defendant's activities were 'systematic and continuous.' * * *
>
> "A second requirement suggested by *International Shoe Co.* v. *Washington*, *supra*, is that the suit should 'arise out of or [be] connected with the [defendant's] activities within the state.' *Id.* 319." (97 N. H. 517 at 519, 521.)

The evidence in *Taylor* showed that the defendant had induced the plaintiff to move from Vermont into New Hampshire to serve there as its employee and better handle its local business, and that plaintiff spent more than half of his working time in New Hampshire promoting sales of defendant's products and servicing them and equipment with which they were used in the hands of local customers. The claim was for defendant's breach of this employment contract. The Court concluded:

> "In our judgment this activity was of such a character as to make it reasonable and just to subject the defendant to the jurisdiction of the courts of this state. The plaintiff's activity was systematic and continuous. Similar activity had been carried on for four years before the plaintiff was employed.

and so far as appears continued after termination of his employment.

* * *

"While the pending action does not arise directly out of sale of the defendant's products, and seeks enforcement of no obligation arising from a sale, yet it is accounted for only by the defendant's activities in New Hampshire. Clearly it is 'connected with' the business done here, and arises from it in the sense that if the defendant had not hired the plaintiff to carry on its activities here the occasion for the suit would never have arisen." (97 N. H. 517 at 520-521.)

In *LaBonte* v. *Company*, 98 N. H. 163 (1952) the New Hampshire Court further explained the local law of jurisdiction over foreign corporations. This was a libel action against Mercury, a foreign publisher of a magazine printed in New Hampshire. The masthead of the periodical bore a New Hampshire publication office address, magazines were stored in New Hampshire pending shipment, and defendant's employees were regularly present in the jurisdiction in connection with publication. The Court observed:

"The assembling, printing and binding of the magazine by Rumford for Mercury is a systematic and continuous activity which is done under orders, instructions and inspections by Mercury. The mailing, shipping, addressing, and storage of the magazine by Rumford has been authorized by Mercury. Rumford, as agent for Mercury receives and forwards mail received here. * * *

"While the concept of doing business is a legal one, it should bear some relation to the concept of doing business in a commercial sense. Certainly the printing and distribution of a magazine is an essential part of the publication of magazines in both a legal and commercial sense. If the plaintiff has a cause of action for libel, the state where the libelous magazine is systematically printed and distributed may assume jurisdiction without offending '. . . our traditional conception of fair play and substantial justice.' *International Shoe Co.* v. *Washington*, *supra*, 320. Any libel that may have been committed by Mercury is sufficiently connected

with its printing and distribution in this state 'to satisfy the primary requirements of the' cited case. *Taylor* v. *Company*, 97 N. H. 517, 521." (98 N. H. 163 at 167-168.)

The *Taylor* and *LaBonte* cases each involved a fact situation in which the foreign corporate defendant had been engaged in continuous, regular and substantial activities in the jurisdiction bearing an obvious "relation to the concept of doing business in a commercial sense" and in each the claim was connected with the local activity. Neither involved such insubstantial and occasional contacts with the jurisdiction as those of Nuodex herein; nor has any other case yet presented to the New Hampshire Court a fact situation similar to that of the present litigation. Under these circumstances, it is to be presumed that the New Hampshire Court would determine the issue of the sufficiency of Petitioner's local contacts to sustain jurisdiction in the present action by due consideration of the broad principles announced in *Taylor* and *LaBonte*, with an awareness that the issue herein ". . . is limited to jurisdiction for service of process and is not concerned with jurisdiction for taxation, license or other purposes" (*LaBonte* v. *Company*, 98 N. H. 163 at 166 [1953]), and with due regard for the decisions of respected courts of sister states as to the want of state jurisdiction under comparable circumstances. Indeed, we respectfully suggest that it would be highly pursuasive to the New Hampshire Court that fact situations closely analagous to that at issue herein have been presented to other tribunals, under similar jurisdiction statutes, and that the decision has been uniformly adverse to the existence of jurisdiction. (*Robbins* v. *Benjamin Air Rifle Co.*, (C.A. 5th Cir., 1954), 209 F. 2d 173; and see many other cases cited in this Argument, Part IV, §2 *infra*.)

§3. The present cases do not meet the New Hampshire criteria for local jurisdiction over a foreign corporation of continuous, systematic and substantial local activities and of a relation of the claim to such a local contact.

We have already set forth above the diversity of the reasoning of the several opinions herein by the reviewing judges of the

Court of Appeals. (*Supra*, Part II, §2). It will be recalled that only the opinion of Circuit Judge Hartigan was unqualified in affirming the finding that Nuodex' local activities in New Hampshire were systematic and continuous. Chief Judge Magruder, in effect, disagreed with Judge Hartigan, for he said:

> "I doubt whether the underlying facts in the case at bar would warrant the ultimate conclusion that Nuodex was 'doing business' within the State of New Hampshire of so continuous and systematic a character as to subject itself to the exercise of personal jurisdiction by the state on account of any and all causes of action, wheresoever arising." (Appendix A, *infra*)

The Chief Judge believed, however, that there was a connection between Nuodex' minimal activities in the jurisdiction and the subject of the claim, and he therefore concurred in the result that the District Court had jurisdiction of the Petitioner. Circuit Judge Woodbury also concurred in the result, arriving at his conclusion by implementing the *International Shoe* doctrine by a "conflict of interest" test (*supra* at 24).

The mere recitation of the reasoning of the Chief Judge and of Circuit Judge Woodbury makes it clear that these two, constituting a majority of the Court of Appeals, arrived at their conclusions sustaining jurisdiction over the Petitioner by the use of jurisdiction standards unknown to the law of New Hampshire. Neither justified his reversal of the trial court by holding that the evidence met the New Hampshire criteria of systematic, continuous and substantial local activities by the foreign corporation together with a claim connected with such local activity. Neither considered that the Supreme Court of New Hampshire, confronted with the issue of this case as a novel issue to it, would be guided in its decision as to the sufficiency of local jurisdiction by the decisions of other respected forums.

For these reasons and with deference to the Court of Appeals, we believe that the holding of that Court herein sustaining the jurisdiction of the District Court over the person of Petitioner cannot be accepted as a correct expression of the relevant law of the State of New Hampshire. We further respectfully submit that the issue of the existence of an independent body of state

law in point is of such importance as to merit the review of the United States Supreme Court.

IV. THE DECISION OF THE COURT OF APPEALS HEREIN IS UPON A QUESTION OF GREAT IMPORTANCE, AND FOR THIS REASON A WRIT OF CERTIORARI SHOULD ISSUE FOR ITS REVIEW.

§1. Personal jurisdiction is an inherently important issue in the federal system.

The importance of the issues involved in the decision below stems from the very nature of our federal system. So long as personal jurisdiction of the defendant in an ordinary civil action is a condition precedent to the exercise of judicial power, there will be controversy in this system as to the power of the local forum over the nonresident defendant. The Supreme Court, as the ultimate arbiter at the head of the federal system, has an especial responsibility to declare and supervise the administration of the law of interstate jurisdiction in order to facilitate the just and efficient working of the system as a whole.

§2. The "doing business" question on facts similar to those of this case has been provocative of litigation, and clarification of the applicable law is therefore important.

Some suggestion of the importance of the issues herein is given by the mass of litigation which is continually going on in the courts involving issues of personal jurisdiction over nonresident corporations. In the period since January 1, 1950 the following cases have been decided on fact situations more or less analagous to those of the present actions, though in every case stronger from a jurisdictional standpoint, and in each of these cases jurisdiction was denied: *Robbins* v. *Benjamin Air Rifle Co.*, (C. A. 5th Cir., 1954) 209 F. 2d 173, a case closely in point on its facts with the present cases; *Pattin* v. *Michaels Art Bronze Co., Inc.*, (C. A. 3d Cir., 1953) 202 F. 2d 541, also very closely in point on its facts to the present cases; *Levine* v. *Wallitzer* (Sup. Crt., Kings C., 1953) 130 N.Y.S. 2d 346; *Vassallo* v. *Slomin*, 278 App. Div. 949, 105 N.Y.S. 2d 60 (1951); *Roberts*

v. *Evans Case Co.* (C. A. 7th Cir., 1955), 218 F. 2d 893; *Johns v. Bay State Etc. Co.* (D. C. Md., 1950), 89 F. Supp. 654; *Read v. Corbitt Co.* (E. D. Pa., 1950), 10 F. R. D. 125; *Anderson v. Page & Hill Homes Inc.* (S. E. D. N. D., 1950), 88 F. Supp. 408; *Radio Station W.M.F.R. v. Fitel-McCullough, Inc.*, 232 N. C. 287, 59 S. E. 2d 779 (1950); and *Albritton v. General Factors Corp.* (C. A. 5th Cir., 1953), 201 F. 2d 138.

In addition to the foregoing recent cases in which jurisdiction over nonresident corporations was denied, in the following cases jurisdiction was sustained where the facts were again somewhat similar to those of the case at bar but the contacts with the jurisdiction were clearly more substantial than those involved herein: *Shilling v. Roux Distributing Co.*, 240 Minn. 71, 54 N.W. 2d 907 (1953); *Koninklijke v. Superior Court*, 107 Cal. App. 2d 495, 237 P. 2d 297 (1951); and *Boyd v. Warren Paint Co.*, 254 Ala. 687, 49 S. 2d 559 (1950).

It is true that many of the foregoing cases were decided primarily upon the reviewing court's construction of local jurisdiction statutes. But all have been decided since the *International Shoe* decision and there was frequent reference in them to that authority with the suggestion that by its standards the same decision would be reached. If the decision in the present case below is correct, the courts which have considered the numerous cases cited above are typically wrong in their conception of the scope of permissible state jurisdiction over foreign corporations under the *International Shoe* rule. Since the due process issue of the *International Shoe* case is always in the background in any action in a state court or in any diversity proceeding in a federal court when the question of jurisdiction over a foreign corporation is raised, we believe that the litigious nature of the jurisdiction question calls for Supreme Court review of the issues herein.

3. Even after declaring the jurisdiction standards of the International Shoe decision, the Supreme Court has recognized that the question of local jurisdiction over a foreign corporation may give rise to difficult and important issues meriting its review.

In the *International Shoe* case the Supreme Court declared that the due process limits of state court jurisdiction over foreign

corporations were to be determined in accordance with traditional notions of fair play and substantial justice, and in its opinion in this case and in the appeal of the *Travelers Health* case (*supra* at 22 *et seq.*) the Court explained and developed certain standards by which it suggested that due process fairness should be appraised. Thereafter, in *Perkins* v. *Benguet Consolidated Mining Co.*, (*supra* at 20 *et seq.*) the Court was presented with a petition for certiorari to review a judgment of the Supreme Court of Ohio (*Perkins* v. *Benguet Etc. Co.*, 155 Oh. St. 116 at 119-120, 98 N. E. 2d 33 [1951]), in which it appeared that that Court might have construed the *International Shoe* rule to preclude jurisdiction as to a foreign corporation where the claim bore no relation to any local contact or activity by the corporation. The Court directed that certiorari issue to review the decision below, found that it was governed by the general test of fairness discussed in *International Shoe*, 342 U. S. 437 at 445, 96 L. Ed. 485 at 492), and concluded that on the evidence of the record ". . . the business done in Ohio by the respondent mining Company was sufficiently substantial and of such nature as to *permit* Ohio to entertain . . ." the cause of action against the nonresident defendant. (342 U. S. 437 at 447, 448, 96 L. Ed. 485 at 493, 494)

The Supreme Court might readily have viewed the issue presented on the petition for certiorari in the *Perkins* case as involving merely error by the Supreme Court of Ohio. Indeed, in the *International Shoe* opinion the Court had already expressly observed:

> ". . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. See Missouri K. & T. R. Co. v. Reynolds, 255 U.S. 565; 65 L. ed 788, 41 S. Ct. 446; Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915; cf. St. Louis S. W. R. Co. v. Alexander, 227 U.S. 218, 57 L ed 486, 33 S Ct. 245, Ann Cas 1915B77, supra." (90 L. Ed. at 103)

But the Court rightly concluded that the issue put by the *Perkins* petition was important, and certiorari was duly ordered.

§4. THE PRESENT CASES PRESENT IMPORTANT CONSTITUTIONAL QUESTIONS.

(a) *"Does the "quality and nature" of a foreign corporation's local contacts affect their jurisdictional significance?"* As did *Perkins* the present cases present an important constitutional issue as to the scope of a court's jurisdiction over a foreign corporation under the federal system. This issue has two aspects. The first is as to the meaning of the language of the Supreme Court in the *International Shoe* decision where it was said that the due process issue as to jurisdiction depends upon the "*quality and nature*" of the defendant's local activities in relation to the fair and orderly administration of the laws. (Emphasis supplied. 326 U.S. 310 at 319, 90 L. Ed. 95 at 104.) We believe that in the present cases the Court of Appeals arrived at its judgment without due consideration of this language but rather by the application to the facts of a mechanical conception of jurisdiction which regards any contact of a foreign corporation with the jurisdiction as substantially the same as any other.

The importance of the point lies in the fact that the modern business world has seen the development of a wide variety of arrangements by which manufacturers provide for the sale and distribution of their products. For example, among other possible arrangements, a manufacturing corporation may have its own field selling organization, either within the manufacturing enterprise itself or as an affiliated corporation; it may sell through regional distributorships of some sort; or it may have one or more independent and unaffiliated sales representatives which handle its goods in different parts of the country. The latter type of representative, operating as an independent contractor, may handle the goods of a single manufacturer exclusively, or it may handle the products of several or of many manufacturers. It may have offices and personnel in every state, or it may have one or more regional offices with personnel assigned to cover territories comprising all or parts of several states. The manufacturer may ship only on order from stocks maintained at its plants, or it may maintain regional warehouses in the vicinity of its major markets. It may maintain a field technical staff to provide services to customers for its products where they are used, or it may concentrate its service activities rather in offices and laboratories at its headquarters.

Does each of the foregoing types of relationship of the basic manufacturing corporation to the various jurisdictions over the country to which its products may ultimately find their way have the same jurisdictional significance? The opinions in the Court below, with the possible exception of that of Chief Judge Magruder, suggest no ground for differentiation. Yet we submit that these different types of relationship of the foreign manufacturing enterprise to the local jurisdiction involve great variation in the "quality and nature" of its local contacts, and that the rule of the *International Shoe* case, properly applied, recognizes that the fairness of holding it to defend in the local forum depends upon the particular quality and nature of the local contacts in the particular case. We respectfully submit that disregard of this principle gave rise to error in these cases.

(b) *Do Nuodex' contacts with New Hampshire meet the International Shoe standards of systematic, continuous and substantial activities in the jurisdiction?* The second aspect of the constitutional question herein before the Court is as to the meaning to be given to certain of the standards of fairness suggested by the Supreme Court in explaining the rule of the *International Shoe* case. For example, if the standard, "systematic and continuous" activities in the jurisdiction, is construed in terms of the factual contexts of the several Supreme Court cases which have heretofore employed this phrase (cf. *supra* at 17 *et seq.*), the contacts of Nuodex with New Hampshire were surely casual, occasional and irregular. Similarly, if the standard of a "substantial" volume of local business suggested in *International Shoe* (326 U. S. 310 at 320, 90 L. Ed. 95 at 104) and *Perkins* (342 U. S. 437 at 447, 96 L. Ed. 485 at 493) is construed in terms of the factual context of those two cases, Nuodex' business with New Hampshire accounts was certainly *de minimis*.[17]

Of course, just as the *Perkins* petition for certiorari might have been dismissed on the ground that it asserted simply error in the Court below, so also here it may be said that petitioner asserts no more than error in the application by the Court of Appeals of standards of law already announced by the Supreme Court in *International Shoe* and subsequent cases. We answer

[17] See Part I of this Argument *supra* for consideration of the standard of a connection between local activity by the foreign corporation and the subject matter of the claim as applied to this case.

respectfully that the errors herein asserted are with regard to constitutional questions which call for and merit the consideration of the Supreme Court.

§5. THESE CASES PRESENT AN IMPORTANT QUESTION AS TO THE APPLICATION OF A COMMON FORM OF STATE STATUTE.

We have already explained in Part I of this Argument *supra* the reasons why we believe that the Court of Appeals clearly erred in reversing the District Court finding that the harm herein complained of bears no relation to any local activity by Petitioner and in ruling that such a connection may be predicated upon Petitioner's registration of Super Ad-it under the New Hampshire Economic Poisons Law. We here refer to that discussion as to the nature of the question to be reviewed and the reasons why it is of such importance as to merit the attention of the Supreme Court. These reasons essentially result from the very common nature of the registration type of statute involved and the frequency with which jurisdiction questions arise with respect to foreign corporations (*supra* at 34 *et seq.*).

§6. THESE CASES PRESENT AN IMPORTANT QUESTION AS TO THE EXISTENCE OF AN INDEPENDENT BODY OF STATE LAW RELATIVE TO JURISDICTION OVER FOREIGN CORPORATIONS.

The nature of the question here referred to is discussed in Part III of this Argument *supra*. We here point out merely that the issue involved in one which is by no means necessarily restricted to these cases, nor even to cases under the New Hampshire statute with respect to service of process on foreign corporations, but could readily arise under similar statutes of many of the states where these statutes have not heretofore been the subject of extensive construction by the local Supreme Court.

V. CONCLUSION

In this Petition we have set forth to the Court certain important questions raised by the judgments of the Court of Appeals hereinbelow which we believe merit the review of the Supreme Court. These questions are not the only questions raised by the Court of Appeals decision, but they are essential questions

upon which we believe that the Court of Appeals committed error and with respect to which we believe that Supreme Court review is important. We so believe because as to these questions the errors committed are of significance which transcends the particular cases herein at issue and makes the Court of Appeals decision a potential authority for error on matters of broad importance.

The ultimate holding of the Court of Appeals herein that the District Court has jurisdiction of Nuodex on the facts of this case is itself a ruling of fundamental importance. Surely it cannot be questioned but that if allowed to stand, it will constitute a large advance toward the complete destruction of the principle of personal jurisdiction as applied to many American manufacturing enterprises which traditionally have been regarded as engaged solely in local enterprise and as selling in channels of interstate commerce. Certainly every one of them advertises to some extent in trade journals, publications and other media which may reach even the most remote jurisdiction, and equally clearly some one interested in promoting their sales may enter any state in the Union, whether as manufacturers representative, sales agent, distributor or otherwise. Is jurisdiction then to be sustained as to such a remote manufacturer whenever an action may arise in any foreign jurisdiction with which such contacts have been had? If "traditional notions of fairness" are indeed to be considered, we submit that the "quality and nature" of the nonresident's local contacts and whether they bear any relation to the doing of business "in an ordinary commercial sense" must be considered. Tested by such criteria, a foreign corporation cannot in reason be said to have been present and doing business locally on such facts as those of this case.

In the District Court, the finding was made that trial in New Hampshire would not be inconvenient to the parties (Appendix B *infra* at 64). This finding followed rulings by the District Court excluding certain evidence offered by Petitioner for the purpose of showing the existence of related litigation in Massachusetts which was offered as bearing upon the question of convenience and as tending with other relevant evidence to establish the inconvenience of a New Hampshire forum. In the Court of Appeals Petitioner contended that the District Court finding as to convenience was based upon clear error and was entitled to no

weight. Although no ruling was expressly made upon this point by the Court of Appeals, it is of interest that two of the three opinions filed in that Court rely in no way whatsoever upon plaintiff's claim of the convenience of a New Hampshire trial.[18]

Even if the finding of the District Court with respect to convenience be accepted, however, and regarded as relevant to the issues herein, Petitioner respectfully submits that such a finding cannot suffice to create personal jurisdiction where there is none otherwise, and that in these cases it cannot overcome the critical deficiencies in the jurisdictional evidence to establish under New Hampshire law that Petitioner was present and doing business locally "in a commercial sense," nor under federal constitutional law that Petitioner's contacts with the jurisdiction were of such quality and nature as to make it consistent with traditional notions of fair play and substantial justice to compel Nuodex to defend these cases in New Hampshire.

For all of the reasons hereinbefore stated, Petitioner respectfully submits that the Court of Appeals committed error in its judgments hereinbelow and that these judgments and the opinions accompanying them give rise to important questions meriting review by the Supreme Court. Wherefore, Petitioner respectfully prays that a writ of certiorari shall issue herein to the Court of Appeals of the First Circuit for review of the said judgments.

Respectfully submitted,

NUODEX PRODUCTS CO., INC.

By

George B. Rowell,

Frank J. Sulloway,

and

Gordon M. Tiffany

Its Attorneys

[18] The point is mentioned only in the concurring opinion of Circuit Judge Woodbury, Appendix A *infra*

(i)

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5182

W. H. Elliott & Sons Co., Inc.,

PLAINTIFF, APPELLANT,

v.

Nuodex Products Co., Inc.,

DEFENDANT, APPELLEE,

No. 5183

E. & F. King & Co., Incorporated

CROSS-CLAIMANT, APPELLANT,

v.

Nuodex Products Co., Inc.,

CROSS-DEFENDANT, APPELLEE.

Appeal from the United States District Court for the District of New Hampshire

[144 F. Supp. 401]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Stanley M. Brown, with whom *McLane, Carleton, Graf, Greene & Brown* was on brief, for W. H. Elliott & Sons Co., Inc.

Joseph S. Ransmeier, with whom *Sulloway, Jones, Hollis & Godfrey* was on brief, for Nuodex Products Co., Inc.

Robert W. Upton, with whom *Upton, Sanders & Upton* was on brief, for E. & F. King & Co., Incorporated.

OPINION OF THE COURT.

March 26, 1957.

HARTIGAN, *Circuit Judge*. These are appeals by the plaintiff-appellant, W. H. Elliott & Sons Co., Inc., and the cross-claimant-appellant, E. & F. King & Co., Incorporated, from orders of the United States District Court for the District of New Hampshire, entered on April 18, 1956 and October 25, 1956, quashing the return and dismissing the actions against the defendant and cross-defendant-appellee, Nuodex Products Co., Inc. Although appellants bring separate appeals from these orders, since they hinge on identical issues we will treat them in this opinion.

This is a civil action brought by W. H. Elliott & Sons Co., Inc., a New Hampshire corporation, hereinafter referred to as Elliott, against two foreign corporations, E. & F. King & Co., Incorporated, a Massachusetts corporation, hereinafter referred to as King, and Nuodex Products Co., Inc., a New York corporation, hereinafter referred to as Nuodex. Jurisdiction is based on diversity of citizenship, and service of process was made under Rule 4(d)(3) and (7) of the Federal Rules of Civil Procedure in the mode prescribed by N. H. Rev. Stat. Ann. c. 300 § 11 (1955).[1] Venue for the district court was established by plaintiff's residence in New Hampshire.

Each defendant filed a motion to dismiss. King's motion, later waived, was on the ground that it was a foreign corporation, not doing business in the district of New Hampshire, and hence not subject to service of process there. Nuodex moved to dismiss upon two grounds, the first, that the complaint failed to state a

[1] In pertinent part this statute provides:

"Service of process * * * on a foreign corporation may be made * * *

* * *

(c) as otherwise provided by law. Whenever any foreign corporation authorized to transact, or transacting business in this state shall fail to appoint or maintain in this state a registered agent upon whom service of legal process or service of any such notice or demand may be had, or whenever service on any such registered agent cannot with reasonable diligence and promptness be made as above provided, or whenever the certificate of authority of any foreign corporation shall be forfeited, then and in every such case the secretary of state shall be and hereby is irrevocably authorized as the agent and representative of such foreign corporation to accept service of any process or service of any notice or demand required or permitted by law to be served upon such corporation

claim upon which relief could be granted, and second, that Nuodex was a foreign corporation not doing business in New Hampshire and therefore not subject to service of process in that district. Upon a hearing on February 28, 1955, the court, in its order of March 29, 1955, denied the first ground of Nuodex' motion. Thereafter, beginning on October 26, 1955, a further hearing was held on the question of jurisdiction. Prior thereto, King answered to the merits and filed a cross-claim against Nuodex, alleging that Nuodex was doing business in New Hampshire and was subject to the jurisdiction of the court.

That hearing was limited to two issues: (1) whether Nuodex had waived its right to contest the question of jurisdiction by previously arguing and submitting for decision the issue of whether Elliott's complaint stated a claim upon which relief could be granted and (2) whether Nuodex was transacting business in New Hampshire so as to be subject to service of process there. These same two issues confront us on appeal.

Focusing our attention first upon the issue of waiver, it appears from the record that the district court on February 28, 1955 had a number of motions before it. These were King's and Nuodex' motions to dismiss, King's motion for extension of time to file answer and Elliott's motion for leave to take oral depositions. Elliott sought permission to take certain depositions in order to show that the two defendants, King and Nuodex, were doing business in New Hampshire. Since the court could not hear the branch of Nuodex' motion to dismiss based on the ground of lack of jurisdiction due to the depositions not yet obtained by Elliott, it agreed to hear first the branch of the motion to dismiss based on the ground that the complaint failed to state a claim for which recovery could be granted. The court stated to the attorneys present as follows:

> "* * * The only pending issue before me at the moment is whether the compaint states a cause or a claim upon which relief can be granted. The second part of the motion, that is, whether or not there is any jurisdiction, is deferred and not heard. The same runs in the same channel as yours does. We will hold that over."

On March 4, 1955 Nuodex filed a written memorandum in

support of its motion to dismiss for failure to state a claim. The introductory paragraph of this memorandum states:

> "1. Defendant Nuodex Products Co., Inc., has moved to dismiss the above-captioned action as to it on two grounds; first, failure of the complaint to state a claim upon which relief can be given, and second, lack of proper service of process and want of jurisdiction in this court. The present memorandum presents the law with respect to the first of the foregoing two grounds of its motion. In presenting it Defendant Nuodex Products Co., Inc. reserves its rights under the jurisdictional objection stated in its motion.
>
> * * * "

On March 29, 1955, the court entered the following order:

> "So much of defendant Nuodex Products Co.'s motion as relates to dismissal of the action because the complaint fails to state a claim upon which relief can be granted is denied. The remainder of the motion has not yet been heard."

On October 26, 1955 the court commenced hearing the branch of Nuodex' motion to dismiss based on lack of jurisdiction over it. By its opinion and order of April 18, 1956 the court quashed the return and dismissed Elliott's action on the ground that it did not have jurisdiction over Nuodex. Based on the same hearing, the court on October 25, 1956 dismissed King's cross-claim for the same reason.

The district court rejected Elliott's and King's contention, also maintained on appeal, that Nuodex, by submitting the first branch of its motion to dismiss on the ground that the complaint failed to state a claim, waived the question of jurisdiction in the second branch of its motion. In so doing the court said:

> "This contention invites but brief consideration. Whatever support this claim of waiver might have had under common law practice, the theory has no standing under Rule 12(b) of the Federal Rules of Civil Procedure, which provides in part as follows: 'Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the respective pleading thereto if one is required, except that

> the following defenses may at the option of the pleader be made by motion: * * * (2) lack of jurisdiction over the person, * * * (6) failure to state a claim upon which relief can be granted: * * * A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. * * *
>
> "The authorities seem to be in complete accord that the joining of defenses in a motion creates no waiver. A like situation was before the court in Olshansky v. Thyer Mfg. Corp., supra, [13 F.R.D. 227 (N.D. Ill. 1952)] and the claim of waiver was rejected. See also, Orange Theatre Corp. v. Rayheratz Amusement Corp., 3d Cir., 1944, 139 F.2d 871, 874, Blank v. Bitker, 7th Cir., 1943, 135 F.2d 962, 966; 2 Moore's Federal Practice, 2262-2264.

We agree with the district court on this point. Yet, we note that none of the cases brought to our attention contain the identical facts of the instant case. Here Nuodex, having joined in a motion its defenses of failure to state a claim and lack of jurisdiction, invoked an order of the court of March 29, 1955 on the sufficiency of the complaint.

It seems that the usual procedure would be for the trial court to decide the jurisdictional branch of such a motion first, since any judgment on the merits of the complaint would be a nullity upon a subsequent finding of no jurisdiction. But it is clear from the record in the instant case that the jurisdictional branch of the motion could not have been heard without certain depositions not yet obtained by Elliott. Further, in the opinion of the lower court trial convenience must have been served by a hearing on the first branch of the motion.

The record also disclosed that Nuodex effectively reserved its right to determine the jurisdiction portion of its motion, as appears from its statements to the court and its aforementioned memorandum. That the court recognized this reservation is evidenced by its order of March 29, 1955. Under such circumstances it can only be inferred that Nuodex was pursuing each ground of its motion to dismiss alternatively, and the order of the court

as to the first branch of the motion was intended to be final only upon a subsequent finding of jurisdiction. Therefore, we believe there was no waiver of jurisdiction by Nuodex on the facts of this case.

We turn next to the issue of whether Nuodex was transacting business in New Hampshire so as to be subject to service of process within the district. The pertinent facts may be stated as found by the district court:

> "The plaintiff in this action, [Elliott], is a New Hampshire corporation, having its usual place of business in Madbury, New Hampshire. The defendants, [King] and [Nuodex] are corporations chartered in Massachusetts and New York, respectively. The plaintiff alleges that it suffered substantial property damage due to a product, Super-Ada [sic], manufactured by defendant Nuodex, and added by defendant King to greenhouse paint which King sold to the plaintiff.
>
> "Nuodex is a manufacturer of special-purpose chemicals used by various industries, and has its usual place of business in New Jersey. As its products are essentially used by manufacturers, Nuodex does not ordinarily sell through the usual retail market. Instead its sales in the United States are primarily, although not exclusively, entrusted to seventeen corporate sales representatives whose activities are supervised by six regional Nuodex sales managers. In the region which includes New Hampshire, Nuodex' sales representative is D. H. Litter Company (hereinafter referred to as Litter), a New York corporation, having a branch office in Allston, Massachusetts. Besides representing Nuodex, Litter has at least seven other accounts, mostly with chemical concerns. It is an independent corporation, and Nuodex has no financial interest in it or any control over it. Litter's payment from Nuodex is in the form of a five per-cent commission, and its soliciting personnel are its own employees who are paid directly by it.
>
> "Litter's activity in New Hampshire on Nuodex' behalf has been carried on by a single employee. He regularly contacted and solicited all business firms in this state known to have a present or prospective interest in any of Nuodex'

products. In order to help Litter stimulate sales, Nuodex furnished it with advertising material and samples. On behalf of Nuodex, the salesman gave customers such technical advice and assistance as he could. On at least two occasions, the New England divisional manager of Litter came into New Hampshire to confer in reference to business pertaining to Nuodex. Although the salesman would occasionally receive an order from a particular customer, the customers would generally forward the order directly to Nuodex, which, in turn, shipped the product to the customer, and Nuodex alone determined whether the purchase could be made on credit. The products promoted in New Hampshire by Litter consisted, at one time or another, of most of Nuodex' output including Super-Adit [sic], the product here complained of.

"On its part, Nuodex carried on few activities independent of Litter. It advertised in various trade journals which circulated in New Hampshire. It sometimes mailed samples directly to buyers, since it maintained a mailing list of all its customers, including those in this state. In one instance Nuodex sent a technician from its New York laboratory to assist a local firm in solving some fabric-treating problems. Nuodex' most overt act was to register some of its products under the terms of a New Hampshire statute. * * * " N. H. Rev. Stat. Ann. c. 438 § 3 (1955).[1]

After reviewing the above facts the district court held that Nuodex was not subject to service in the district of New Hampshire and accordingly ruled that "the return must be quashed and the action dismissed."

In so holding the court considered the test of "fair play and substantial justice," enunciated in *Internat. Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), and sought to apply it as

[1] It is a matter of record that Nuodex registered Super Ad-It, the product complained of here, under this statute both for industrial and retail sale in each of the years 1953, 1954, 1955. The statute provides:

"438:3 *Registration.* Every economic poison which is distributed, sold or offered for sale within this state or delivered for transportation or transported in intrastate commerce or between points within this state through any point outside this state shall be registered in the office of the commissioner, and such registration shall be renewed annually. * * * "

adopted by the Supreme Court of New Hampshire in three cases: *LaBonte* v. *American Mercury Magazine, Inc.*, 98 N.H. 163, 96 A.2d 200 (1953), *Taylor* v. *Company*, 97 N.H. 517, 92 A.2d 910 (1952), *Grace* v. *Company*, 95 N.H. 74, 57 A.2d 619 (1948). In this manner, the court reasoned that, since the New Hampshire Supreme Court in the *LaBonte* and *Taylor* cases referred to the criterion that the cause of action arise out of or be connected with activities within the state as a "requirement", there is no jurisdiction in New Hampshire "unless this 'requirement' is met." The court's finding concerning this "requirement" was:

> "I am unable to discover any activity in the state which is connected with the injury here complained of. There is no evidence that King purchased Super-Adit because of solicitation or advertising in New Hampshire, nor is there any evidence that the plaintiff purchased King's paint because of Nuodex' activities within the state. . . ."

Having concluded that this "requirement" had not been met, the court held that it had no jurisdiction over Nuodex, notwithstanding that it found, as detailed in its opinion, the other "criteria" of the *International Shoe* case were fully satisfied.

On appeal Elliott and King contend that the district court erred in holding that the criterion or standard that the cause of action arise out of or be connected with activities within the state, presented in the *International Shoe* case, has been made a "requirement" by the New Hampshire Supreme Court. Rather, appellants assert that the New Hampshire Supreme Court looks upon all the *International Shoe* "standards" as limitations on the due process clause of the Fourteenth Amendment. If this contention were valid, then, under *Perkins* v. *Benguet Mining Co.*, 342 U.S. 437 (1952), it would not be necessary in order for an action to be maintained against a foreign corporation for it to arise out of the activities of the corporation in the particular state.

Since we believe that the lower court erred in finding that Elliott's cause of action did not arise out of or was not connected with Nuodex' activities within New Hampshire, we need not decide whether the New Hampshire Supreme Court has made a "requirement" of this *International Shoe* "standard." However,

be it noted that the New Hampshire cases do not leave this question free from doubt.

It is fitting for us now to set forth the reasons that compel us to disagree with the learned district judge concerning the aforementioned finding.

Elliott claims that Super Ad-It, manufactured by Nuodex and sold by Litter to King and embodied by King in a paint sold by it to Elliott and thereafter used by Elliott, caused substantial damage to the latter's greenhouses in New Hampshire. Though the district court properly found that activities carried on in New Hampshire by Litter on behalf of Nuodex were continuous and systematic, it seems to have taken the view that, unless a direct solicitation or advertisement by Nuodex in New Hampshire either caused King to purchase Super Ad-It or caused Elliott to purchase King paint, the injury complained of here did not arise out of and was not connected with the activities of Nuodex in New Hampshire.

Contrary to the district court, we believe that such connection is demonstrated by Nuodex' industrial and retail registration of Super Ad-It under the New Hampshire Economic Poisons Law, set forth above, in 1953 and 1954. It seems that without such registration Super Ad-It could not be sold legally in New Hampshire even in a "mixture of substances," such as King's paint. See N. H. Rev. Stat. Ann. c. 438 § 1 (1955). Therefore, the damage occasioned by its shipment into New Hampshire by King was connected with and arose from activity by Nuodex in New Hampshire in the sense that if Nuodex had not registered the product and in the absence of other registration, the product could not have legally entered New Hampshire and the suit would not have arisen. Thus the damage complained of here "is accounted for only by the defendant's activities in New Hampshire." *Taylor v. Company*, supra at 521 and 913.

Moreover, it is vitally significant that Nuodex did much more than merely register its product in New Hampshire, as detailed in the lower court's opinion. The district court found that there was a continuous systematic course of business activity in the state by Nuodex through Litter. This activity included efforts to increase the sales of Super Ad-It in New Hampshire. Although the sale that resulted in the damage complained of here was made by Litter to King in Massachusetts, the record in addition

reveals that retail packages of Super Ad-It were getting into the state either by direct sales or other distribution routes. All these various methods of distributing the substance in question were part and parcel of Nuodex' over-all sales program.

In conclusion, as the district court suggested in its opinion, under New Hampshire law Nuodex can be held subject to service on account of the activity of its sales representative, Litter, notwithstanding that Litter was an independent corporation representing other companies besides Nuodex in the state. See *LaBonte* v. *American Mercury Magazine, Inc.*, supra. Neither does the fact that the activities of Litter largely constituted mere solicitation preclude service in this case. *Taylor* v. *Company*, supra. Nor do we believe that due process would be violated by holding Nuodex, a foreign corporation, subject to process where, as here, through sales managers it supervised the activities of Litter, its representative, and on at least one occasion joined with Litter to service an account in New Hampshire. The conclusion that Litter was to a certain extent under the direction of Nuodex in conducting the latter's sales program cannot be avoided on the facts of this case as detailed above and in the lower court's opinion.

For all the above reasons we conclude that Nuodex was subject to service in New Hampshire and that the district court had jurisdiction to entertain the action brought by Elliott, as plaintiff, and King, as cross-claimant.

A judgment will be entered vacating the orders of the district court and remanding the cases to that court for further consistent proceedings.

MAGRUDER, *Chief Judge* (concurring). I agree with Judge Hartigan's opinion to the effect that Nuodex cannot be held to have waived its objection to the jurisdiction. I also concur in Judge Hartigan's conclusion on the merits of the jurisdictional issue, though I am not sure that I would have put the matter just as he has done.

The basis of a state's personal jurisdiction over a foreign corporation has given rise to much dubious theorizing. On the foundation of "doing business" within a state, the earlier explanations of "implied consent" to the service of process, or of corporate "presence," have come to be recognized as fictitious forms of statement. Now it is fashionable to say that we must

consider the extent of the corporate activities manifested within the state to answer the query whether the exercise of personal jurisdiction over the foreign corporation would offend traditional notions of fair play and substantial justice—if it would, then the exercise of such personal jurisdiction is forbidden by the due process clause of the Fourteenth Amendment. See the discussion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Of course it is true that a state is free to impose additional "requirements" to the exercise of personal jurisdiction over foreign corporations, beyond the minimal requirements of the due process clause. However, I fail to find in the New Hampshire statute or in the New Hampshire court decisions any indication that New Hampshire has undertaken, as a matter of local law, to impose any such additional requirements. The important point is one of federal constitutional law, as the *International Shoe* case pointed out. That is to say, the manifested activities within the state by a foreign corporation may amount to a "doing business" of so continuous and systematic a nature as reasonably to permit the state to subject the foreign corporation to service of process with respect to any cause of action, wheresoever arising. On the other hand, a much lesser manifestation of activity within the state may, consistently with due process, justify a state to exercise personal jurisdiction over the foreign corporation, sued on a cause of action having some connection with or arising out of those activities within the state.

I doubt whether the underlying facts in the case at bar would warrant the ultimate conclusion that Nuodex was "doing business" within the State of New Hampshire of so continuous and systematic a character as to subject itself to the exercise of personal jurisdiction by the state on account of any and all causes of action, wheresoever arising. But as Judge Hartigan's opinion points out, Nuodex did make some efforts through a New Hampshire representative to promote the sales of its products in New Hampshire. The particular "Super Ad-It" which was alleged to have caused the harm in the present case was not sold by Nuodex in New Hampshire, but Nuodex in New Jersey put out in commerce a poisonous chemical, some of which it no doubt hoped and expected would eventually find its way into New Hampshire as an ingredient of paint products sold by others. That is what happened here; a salesman of codefendant King

sold to the plaintiff in New Hampshire some paint containing Nuodex Super Ad-It as an ingredient. This sale was rendered lawful under the New Hampshire law only because Nuodex had registered its poisonous chemical under the New Hampshire Economic Poisons Act. The subsequent use by the plaintiff of such paint product is alleged to have resulted in the tangible harm, inflicted in New Hampshire, upon the property of the plaintiff, a citizen of New Hampshire; and it is this tangible harm which is the subject of the cause of action now sued on. I have no doubt that under the Fourteenth Amendment the State of New Hampshire has power to subject the foreign corporation to a reasonable mode of personal service (as was the service here) in order to compel Nuodex to answer in the New Hampshire courts to the aforementioned local complaint. Cf. *Hess* v. *Pawloski*, 274 U.S. 352 (1927). If this complaint had been brought in a New Hampshire state court, service of process could have been made upon the Secretary of State, who would have had the duty, under the local statute, to give notice of the pendency of the cause of action to the foreign corporation. That being so, equivalent service of process is good under Rules 4(d)(3) and (7) of the Federal Rules of Civil Procedure.

WOODBURY, *Circuit Judge*, (concurring). I think it helpful to distinguish sharply between the two questions of law involved in cases like this: 1) the preliminary question to be decided by application of state law and, 2) the further question, if presented, to be decided by application of federal constitutional law. Judge Goodrich of the Court of Appeals for the Third Circuit sitting on this Court by assignment did this clearly and concisely in *Pulson* v. *American Rolling Mill Co.*, 170 F.2d 193, 194 (C.A. 1, 1948), wherein he said:

> "There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law; has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature. If the state has purported to exercise jurisdiction

over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. Const. art. 1, § 8, cl. 3; Amend 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation."

In the *Pulson* case we took the view that the applicable Massachusetts statute as interpreted by the Supreme Judicial Court of that Commonwealth was not broad enough, in view of the limited local activities of the foreign corporation there involved, to subject it to suit in Massachusetts. Thus in that case we did not reach the federal question of the limitation on state power imposed by the due process clause of the Fourteenth Amendment. I think the situation in New Hampshire is different. In my opinion the New Hampshire statute, unlike that of Massachusetts, has not been limited by judicial decision to restrict the scope of state power short of federal constitutional bounds.

Campbell v. *United States Radiator Corp.*, 86 N.H. 310 (1933), and *Grace* v. *Proctor & Gamble Co.*, 95 N.H. 74 (1948), certainly indicate unmistakably that in New Hampshire foreign corporations are subject to local jurisdiction up to the limits imposed upon state action by the due process clause of the Fourteenth Amendment. Perhaps some rather ambiguous language used in deciding the later cases of *Taylor* v. *Klenzade Products, Inc.*, 97 N.H. 517 (1952), and *LaBonte* v. *American Mercury Magazine, Inc.*, 98 N.H. 163 (1953), can be interpreted as casting some doubt upon the holding of the earlier *Campbell* and *Grace* cases. But in the later *Taylor* and *LaBonte* cases the court did not purport to overrule, indeed it did not even, except possibly by innuendo, cast doubt upon the holding of the earlier cases cited above. As I read the four cases together, I think it reasonably clear that New Hampshire has not departed from its original interpretation of the local statute as exerting jurisdiction over foreign corporations up to the constitutional limit. This, on my analysis, disposes of the question of state law and brings up the question of federal law, i.e. what limitation does the due process clause impose on the state in this regard?

The *International Shoe* case cited and discussed by my associates provides the answer to this question. In that case, as Chief Judge Magruder points out, the Court departed from the rationale of earlier cases and held that the test of due process in this context is whether the nature and extent of a foreign corporation's local activities are of sufficient extent to subject it to local jurisdiction without giving offense to "traditional notions of fair play and substantial justice."

I suggest that application of the test of "fair play and substantial justice" calls for reference to the specific interests in conflict in each particular case. Thus in this case I think we should weigh on the one hand the legitimate interests of the state, 1) in providing local access to compensation for wrongs done to its citizens, and, 2) in regulating potentially harmful activity within the state, as against, on the other hand, the legitimate interests of the foreign corporation relative, 1) to its reasonable expectations as to the laws and liabilities to which it was subjecting itself, and, 2) to its opportunity to defend itself without undue expense and inconvenience.

In this case the foreign corporation was promoting by sales force and advertising the use of its commercial poisons in the state of New Hampshire. And it registered its product under the New Hampshire Economic Poisons Law. Clearly then it not only hoped but also anticipated that its product would be used in the state. Furthermore, it certainly must have realized that the poisonous nature of its product created an appreciable risk of injury to persons in the state, even though the amount used, its value and the number of local users was relatively small. Under these circumstances I cannot think it unfair or unjust to subject the defendant to local jurisdiction. Furthermore, the factors enumerated indicate that the state's interest in subjecting the defendant to local jurisdiction is substantial.

It is true that there is no clear showing that the plaintiff's use of Super Ad-It was the result of the defendant's promotional activity in the state. But it does not logically follow that the fairness of exercising local jurisdiction over the defendant should be determined by the fortuitous factor of the plaintiff's state of mind when he bought the product. This factor relates more logically to fairness to the plaintiff of denial of jurisdiction. Rather the fairness to the foreign corporation is more logically

related to what it might reasonably have expected as a result of its local activities.

In this case the use of the defendant's product in New Hampshire was certainly expected by the defendant since it had actively promoted that use in the state. And it was hardly an unforeseeable consequence of that use that the defendant would incur local legal liabilities. These considerations, coupled with the District Court's finding that no undue inconvenience or expense would be cast upon the defendant in defending this action in New Hampshire, lead me to the conclusion that to subject it to local jurisdiction does no violence to "traditional notions of fair play and substantial justice."

APPENDIX B

Opinion of United States District Court For The District of New Hampshire

Civil Action No. 1465

W. H. Elliott & Sons Co., Inc.

v.

E. & F. King & Co., Incorporated

and

Nuodex Products Co., Inc.

April 18, 1956

(Reported at 144 F. Supp. 401)

* * * (Headnotes omitted)

CONNOR, District Judge.

This is a civil action brought by W. H. Elliott & Sons Co., Inc., against two foreign corporations, E. & F. King & Co., Incorporated and Nuodex Products Co., Inc. The complaint alleges two theories of recovery on separate counts, the first for negligence, and the second for breach of warranty. Jurisdiction is based on diversity of citizenship, and service of process was made under Rule 4 (d) (3) and (7) of Federal Rules of Civil procedure 28 U. S. C. A. in the mode prescribed by the statutory

laws of this state. RSA 300:11. Venue for this court is established by the fact that the plaintiff is a resident of New Hampshire.

Each defendant filed a motion to dismiss, that of defendant King Company being on the sole ground that it was a foreign corporation, not doing business in the District of New Hampshire, and hence not subject to service of process here. This motion has been waived. The defendant Nuodex Products Co. moved to dismiss upon two grounds, the first, that the complaint failed to state a claim upon which relief could be granted, and second, that Nuodex is a foreign corporation, not doing business in the State of New Hampshire, and therefore not subject to service of process in this district. Upon hearing, the court denied the first part of the motion. A further hearing was had on the question of jurisdiction. Prior thereto, the defendant King Company answered to the merits, and filed a cross-claim against Nuodex, alleging that Nuodex was doing business within the state of New Hampshire and subject to the jurisdiction of this court.

The hearing was limited to two issues: (1) whether the defendant Nuodex was transacting business in New Hampshire so as to be subject to service of process within this district, and (2) whether the defendant Nuodex has waived its right to contest the question by previously arguing and submitting for decision the issue of whether the plaintiff states a claim upon which relief can be granted.

Findings of Fact

The plaintiff in this action, W. H. Elliott & Sons Co., Inc., hereinafter referred to as Elliott, is a New Hampshire corporation, having its usual place of business in Madbury, New Hampshire. The defendants, E. & F. King & Co., Incorporated, hereinafter referred to as King, and Nuodex Products Co., Inc., hereinafter referred to as Nuodex, are corporations chartered in Massachusetts and New York, respectively. The plaintiff alleges that it suffered substantial property damage due to a product, Super-Adit, manufactured by defendant Nuodex, and added by defendant King to greenhouse paint which King sold to the plaintiff.

Nuodex is a manufacturer of special-purpose chemicals and has its usual place of business in New Jersey. As its products

are used chiefly by manufacturers. Nuodex does not customarily sell through the retail market. Instead its sales in the United States are primarily, although not exclusively, entrusted to seventeen corporate sales representatives whose activities are supervised by six regional sales managers. In the region which includes New Hampshire, Nuodex' sales representative is D. H. Litter Company (hereinafter referred to as Litter), a New York corporation, having a branch office in Allston, Massachusetts. Besides representing Nuodex, Litter has at least seven other accounts, mostly with chemical concerns. It is an independent corporation, and Nuodex has no financial interest in it or any control over it. Litter's payment from Nuodex is in the form of a five per cent commission, and its soliciting personnel are its own employees who are paid directly by it.

Litter's activity in New Hampshire on Nuodex' behalf has been carried on by a single employee. He regularly contacted and solicited all business firms in this state known to have a present or prospective interest in any of Nuodex' products. In order to help Litter stimulate sales, Nuodex furnished it with advertising material and samples. On behalf of Nuodex, the salesman gave customers such technical advice and assistance as he could. On at least two occasions, the New England divisional manager of Litter came into New Hampshire to confer in reference to business pertaining to Nuodex. Although the salesman would occasionally receive an order from a particular customer, the customers would generally forward the order directly to Nuodex, which, in turn, shipped the product to the customer, and Nuodex alone determined whether the purchase could be made on credit. The products promoted in New Hampshire by Litter consisted, at one time or another, of most of Nuodex' output, including Super-Adit, the product here complained of.

On its part, Nuodex carried on few activities independent of Litter. It advertised in various trade journals which circulated in New Hampshire. It sometimes mailed samples directly to buyers, since it maintained a mailing list of all its customers, including those in this state. In one instance, Nuodex sent a technician from its New York laboratory to assist a local firm in solving some fabric treating problems. Nuodex' most overt act was to register several of its products under the terms of a New Hampshire statute which provides that "it shall be unlawful for any

person to distribute, sell, or offer for sale within this state * * * any economic poison which has not been registered * * *." RSA 438:2.

The product here complained of, Super-Adit, was sold by Litter to King in Massachusetts. King subsequently added this product to a special paint which it was selling for use in greenhouses. While there is no evidence that Elliott purchased this paint directly from King, the present state of the pleadings discloses this to be so. Similarly, there is no evidence that either Nuodex or Litter sold it to the plaintiff, nor is such asserted in either the complaint or answer.

Conclusions and Rulings

[1, 3] The essential question here presented, whether a foreign corporation is subject to service of process, is one of substance. Canvas Fabricators, Inc. v. William E. Hooper & Sons Co., 7 Cir., 1952, 199 F.2d 485, 488. Since there is no federal statute applicable and this is a diversity case, it follows that the issue must be determined by state law, as in matters of substance this court is "in effect only another court of the State * * * ." Guaranty Trust Co. v. York, 326 U. S. 99, 108 65 S. Ct. 1464, 1469, 89L. Ed. 2079. Such is the rule of this circuit. Pulson v. American Rolling Mill Co., 1 Cir., 1948, 170 F.2d 193; Kelley v. Delaware, L. & W. R. Co., 1 Cir., 1948, 170 F.2d 195; see also Canvas Fabricators, Inc. v. Hooper & Sons Co. supra 199 F.2d 486; Olshansky v. Thyer Mfg. Corp., D.C. N.D. Ill., 1952, 13 F.R.D. 227, 230; Read v. Corbitt, D.C. E.D. Pa., 1950, 10 F.R.D. 125. And this position is further enforced by the fact that the validity of the service of process is predicated upon a state statute.

Despite the foregoing, it has been urged upon this court that this case is governed, not by local law, but by the rule laid down in International Shoe v. Washington, Office of Unemployment Compensation and Placement, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95. In that case, the Supreme Court, brushing aside the old distinctions of "presence" and "doing business," announced that due process now requires only that a foreign corporation maintain such minimum standards within the state which is asserting jurisdiction, so that "the maintenance of the suit does not offend 'traditional notions of fair play and sub-

stantial justice'." Id., 326 U.S. 316, 66 S.Ct. 158. In formulating this new "test", the Supreme Court was setting limitations upon state courts and was not defining the lengths to which a federal court must go in asserting jurisdiction over a foreign corporation. If International Shoe applies to federal courts at all, it applies when the federal court is expounding state law in a diversity case by laying down due process limitations upon the scope of its jurisdiction. A possible reason for the parties to the action urging an opposite view upon this court is found in the language of Grace v. Company, 95 N.H. 74, 57 A.2d 619, 621. There, the court quotes an earlier New Hampshire decision [Campbell v. United States Radiator Corp., 86 N.H. 310, 167A, 558] to the effect that the "question is one of federal law," and goes on to say that it considers "federal decisions as controlling rather than convincing." Id. 95 N.H. 76, 57 A.2d 621. This statement was taken to mean that federal law and not state law decides whether or not New Hampshire will exercise jurisdiction over a foreign corporation in a particular case. To accept the language as a statement of the law would be to ignore several other factors. First of all, the basic issue involved in all these cases is the scope of a state statute (in New Hampshire RSA 300:11), and except for the due process limitations placed on it by certain constitutional pronouncements like the International Shoe case, there hardly can be said to be any federal law on the question. Secondly, in a later case, Kenison, C. J., seems to have overruled any such interpretation of the language in Grace v. Proctor & Gamble Company, *supra*, when he pointed out that while "many of the persuasive authorities cited are federal cases, the issue to be decided is one of state law." Labonte v. American Mercury Magazine, Inc., 98 N.H. 163, 166, 96 A.2d 200, 202, 38 ALR 2d 742. Thirdly, the test laid down in International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, *supra* must be considered in a case such as this, not because the federal constitutional limits upon the acquisition of jurisdiction by state courts as discussed in that case apply directly to federal courts, but because federal consequences cannot properly be attached to an unconstitional state law.

[4] Turning now to local law, it appears that the Supreme Court of New Hampshire has passed on the question of the power

to serve process upon foreign corporations only three times since the International Shoe case. Grace v. Proctor & Gamble Company, *supra*, Taylor v. Klenzade Products, Inc., 97 N.H. 517, 92 A.2d 910; La Bonte v. American Mercury Magazine, Inc., *supra*. In the first of these cases, the trial court, after reserving and transferring the question of jurisdiction over a foreign corporation, was directed to "be guided in its findings and ruling by International Shoe Co. v. Washington [Office of Unemployment Compensation and Placement], * * * ." Grace v. Proctor & Gamble Company, *supra*, 95 N.H. 77, 57 A.2d 621. As a result of this case, New Hampshire adopted the "reasonable and just" test Id., 95 N.H. 76, 57 A.2d 621, and all previous decisions must be considered as overruled.

[5] In laying down the test of "fair play and substantial justice the Supreme Court of the United States suggested several "criteria" or "standards" which could be used to measure the facts in each case: Some of these have been utilized by the local court in applying the above quoted test. Without losing sight of the basic principle that each case must be decided on its own facts, Favell-Utley Realty Co. v. Harbor Plywood Corp., D.C. N.D. Cal., 1950, 94 F. Supp. 96, 98, I feel that I should measure the facts of this case against these standards in reaching my decision.

[6] The first criteria suggested both by the Supreme Court of the United States and of New Hampshire, is whether the defendant's activities were "systematic and continuous." International Shoe v. Washington, Office of Unemployment Compensation and Placement, *supra*, 326 U. S. 320, 66 S. Ct. 160; Taylor v. Klenzade Products, Inc., *supra*, 97 N.H. 519, 97 A.2d 912. The activities carried on in this state by Litter on behalf of Nuodex were continuous and systematic. Litter's salesman, regularly and systematically, visited various business concerns in New Hampshire, and would attempt to "sell everything for all the companies we represent." It is true that some federal cases have held that "mere solicitation" is not enough. Roberts v. Evans Case Co., 7 Cir., 1955, 218 F.2d 893; Johns v. Bay State Abrasive Products Co., D. C. Md., 1950, 89 F. Supp. 654. But these were based upon local law and not upon constitutional principles. On the other hand, Justice Rutledge has observed that no "business man would regard 'selling,' 'the taking of orders,' 'solicitation,' as not

'doing business'." Frene v. Louisville Cement Co., 1943, 77 U. S. App. D.C. 129, 134 F.2d 511, 516, 146 A.L.R. 926 Commenting upon this, Carter J., said: "We are in agreement with the conclusion reached by Justice Rutledge and the trend of the courts in the more recent cases that mere solicitation, without more, constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business." Perkins v. Louisville & N. R. Co., D.C. S.D. Cal. 1951, 94 F. Supp. 946, 951; see also, London's Inc. v. Mack Shirt Corp., D.C. Mass., 1953, 114 F. Supp. 883. This trend has met with local approval. In Taylor v. Klenzade Products, Inc., *supra*, the activity carried on in this state was very similar to that in the case at bar. There, the plaintiff, acting as agent for the defendant, sought out new dealers, helped to service established accounts, and attempted to stimulate new business for the defendant's products. In holding that the defendant was subject to the jurisdiction of New Hampshire courts, the court recognized that solicitation is an essential commercial activity. "Distribution can be made however only where a market exists, and a market in turn depends upon demand." Id. 97 N.H. 520, 92 A.2d 912. "In our judgment this activity was of such a character as to make it reasonable and just to subject the defendant to the jurisdiction of the courts of this state." Id., 97 N.H. 520, 92 A.2d 913.

[7, 8] Once accepting the proposition that solicitation is a commercial activity, recognized by New Hampshire as sufficient to constitute "transacting business" under New Hampshire RSA 300: 11(c), we are faced with the problem whether or not the activities of Litter can be attributed to Nuodex. I believe the fact that Litter was a separate and independent corporation and not an "agent" of Nuodex, in the legal sense, is not a bar to service of process upon Nuodex in New Hampshire. In LaBonte v. American Mercury Magazine, Inc., *supra*, the Supreme Court held the defendant, The American Mercury, subject to service of process, even though all of the activities attributed to the defendant in this state were carried on by the Rumford Press, an independent and separate corporation, which was even less under the direction of American Mercury than Litter was under the direction of Nuodex. Nor is it of any significance that Litter worked for several other companies beside Nuodex. Rumford Press printed many magazines other than the American Mercury.

Learned Hand, J., expressed what seems to me to be the best rule when he said: "* * * we cannot see that it was important that the agent worked for several principals." Bomze, et al. v. Nardis Sportswear, Inc., 2d Cir., 1948, 165 F.2d 33, 36.

[9] Whether or not it is a violation of due process to hold Nuodex subject to service on account of the activities of an independent corporation, and whether it is of consequence that Litter is not a New Hampshire corporation, are questions to be deferred until the other criteria or standards are resolved. Under the rule of this circuit, the question of due process "is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation." Pulson v. American Rolling Mill Co., *supra*, 170 F.2d 194.

[10] A second criterion or "standard" suggested by the Supreme Court of the United States and the Supreme Court of New Hampshire is to estimate the inconvenience "which would result to the corporation from a trial away from its 'home' or principal place of business." International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, *supra*, 326 U. S. 317, 66 S. Ct. 158; cited and adopted in Taylor v. Klenzade Products, Inc., *supra*, 97 N. H. 519, 92 A.2d 912. In the case at bar, there seems to be no basis for holding that it would be a hardship to require Nuodex to defend this suit in New Hampshire. In weighing the equities of this case, it appears that it is not inconvenient to hold trial here. Nuodex admits that it can be served with process in Massachusetts, and the few extra miles of travel to the district of the situs imposes no undue burden.

A third criterion suggested in International Shoe, 326 U.S. at page 319, 66 S. Ct. at page 159, is to examine the extent to which the defendant exercised the privilege of conducting activities within New Hampshire, and has enjoyed the benefits and protection of its laws. It appears that the local courts have not adopted this criterion, for nowhere is it discussed. But it could be observed that the defendant did take advantage of the provisions of New Hampshire RSA 438:3, and registered its products so that they might be legally sold in this state, and, as the United States Supreme Court observes, the "exercise of that privilege may give rise to obligations * * *." International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, *supra*, 326 U. S. 319, 66 S. Ct. at page 160.

[11, 12] The fourth criterion or standard suggested in the International Shoe case, 326 U. S. at page 319, 66 S. Ct. at page 160, is to examine how far the obligations sued upon arise out of, or are connected with, the activities of the foreign corporation within the state. This test has been adopted by the Supreme Court of New Hampshire. Taylor v. Klenzade Products, Inc., *supra*, 97 N.H. 519, 521, 92 A.2d 912, 913; LaBonte v. American Mercury Magazine, Inc., *supra*, 98 N.H. 168, 96 A.2d 203. It probably is most clearly expressed in the Taylor case, where it was said: "It is not essential that the cause of action arise in New Hampshire, provided it arises out of business done here." See 97 N.H. at page 519, 92 A.2d at page 912. I am unable to discover any activity in the state which is connected with the injury here complained of. There is no evidence that King purchased Super-Adit because of solicitation or advertising in New Hampshire, nor is there any evidence that the plaintiff purchased King's paint because of Nuodex' activities within the state. Therefore, I conclude that this fourth "standard" is not met.

[13] This raises the question as to whether all of the standards or criteria must be present in order to confer jurisdiction. In International Shoe, Chief Justice Stone continually refers to these as criteria or "standards." (See 326 U. S. at pages 319, 320, 66 S. Ct. at pages 159, 160.) But the Supreme Court of New Hampshire, purporting to adopt the language in that case, refers to the criterion that the cause of action arise out of or be connected with activities within the state as a "requirement." Taylor v. Klenzade Products, Inc., *supra*, 97 N. H. 521, 92 A.2d 913; LaBonte v. American Mercury Magazine, Inc., *supra*, 98 N.H. 168, 96 A.2d 203. Therefore, it would seem that in New Hampshire there is no jurisdiction unless this "requirement" is met. It does not matter that the court might not have intended to be as strict as this language sounds. The Court of Appeals for this circuit has ruled that "Whether this be so or not we think it is no business for a federal court to meddle in. * * * We think it is the business of the federal court to follow the state court's construction of its own statute * * * until the state court announces a different rule." Pulson v. American Rolling Mill Co., *supra*, 170 F.2d 195. In the light of the state court's use of the word "require-

ment." I feel that I have no choice but to rule that this court lacks jurisdiction.

[14] Nor is there any merit in the argument that the state must grant jurisdiction if the federal limits of due process allow. "Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process." Missouri Pac. R. Co. v. Clarendon Boat Oar Co., 257 U. S. 533, 535, 42 S. Ct. 210, 211, 66 L. Ed. 354; Perkins v. Benguet Consolidated Mining Co., 342 U. S. 437, 440, 72 S. Ct. 413, 96 L.Ed. 485.

[15] It is jointly urged by the plaintiff and the co-defendant that Nuodex, by submitting the first branch of its motion to dismiss* on the ground that the complainant fails to state a claim upon which relief can be granted, waived the question of jurisdiction raised in the second branch of its motion.

This contention invites but brief consideration. Whatever support this claim of waiver might have had under common law practice, the theory has no standing under Rule 12(b) of the Federal Rules of Civil Procedure, which provides in part as follows: "Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (2) lack of jurisdiction over the person, * * * (6) failure to state a claim upon which relief can be granted, * * *. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. * * *."

The authorities seem to be in complete accord that the joining

*The motion: "Now comes the defendant Nuodex Products Co., Inc. and moves the Court as follows: (1) To dismiss the action because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc. upon which relief can be granted.

(2) To dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant Nuodex Products Co., Inc. is a corporation organized under the laws of the State of New York, which has never done business within The State of New Hampshire, and was not and is not subject to service of process within the District of New Hampshire."

of defenses in a motion creates no waiver. A like situation was before the court in Olshansky v. Thyer Mfg. Corp., supra, and the claim of waiver was rejected. See also, Orange Theatre Corp. v. Rayherstz Amusement Corp., 3 Cir., 1944, 139 F.2d 871, 874; Blank v. Bitker, 7th Cir., 1943, 135 F.2d 962, 966; 2 Moore's Federal Practice, 2262 - 2264.

Nuodex not being subject to service within this district, the return must be quashed and the action dismissed. An order will be so entered.

APPENDIX C

Constitutional Provisions, Statutes, and Rules Involved

1. *The United States Constitution, Amendments, Article XIV, §1*

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. *Supreme Court Jurisdiction (28 U. S. C. §1254)*

"§1254. Courts of appeals; certiorari; appeal; certified questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

3. *The Federal Diversity Statute (28 U.S.C. §1332)*

"§1332. Diversity of citizenship; amount in controversy

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds

the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States;

"(2) Citizens of a State, and foreign states or citizens or subjects thereof;

"(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

"(b) The word 'States', as used in this section, includes the Territories and the District of Columbia. June 25, 1948, c. 646, 62 Stat. 930."

4. *The Federal Venue Statute (28 U.S.C. §1391)*

"§1391. Venue generally

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

"(d) An alien may be sued in any district. June 25, 1948, c. 646, 62 Stat. 935."

5. *The Federal Rules of Civil Procedure, Rule 4 (d) (3) and 4 (d) (7)*

"Rule 4. Process

* * *

"(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: * * *

"(3) Upon a domestic or foreign corporation or upon a

[1] So in original

partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. * * *

"(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

6. *The New Hampshire statute for service of process on foreign corporations (RSA 300:11)*

Service of Process

"300:11 How Made. Service of process in any suit, action or proceeding, or service of any notice or demand required or permitted by law to be served on a foreign corporation, may be made on such corporation as otherwise provided by law or by service thereof on the registered agent of such corporation. Service of any such process or of any such notice or demand upon a registered agent as registered agent may be made

"(a) by serving a copy thereof on its president, a vice president, the clerk, the secretary or an assistant clerk or an assistant secretary, if such registered agent is a corporation, or

"(b) by leaving an attested copy of such process, notice or demand in the registered office of the registered agent during regular business hours, or

"(c) as otherwise provided by law. Whenever any foreign corporation authorized to transact, or transacting business in this state shall fail to appoint or maintain in this state a registered agent upon whom service of legal process or

service of any such notice or demand may be had, or whenever service on any such registered agent cannot with reasonable diligence and promptness be made as above provided, or whenever the certificate of authority of any foreign corporation shall be forfeited, then and in every such case the secretary of state shall be and hereby is irrevocably authorized as the agent and representative of such foreign corporation to accept service of any process or service of any notice or demand required or permitted by law to be served upon such corporation."

7. *The New Hampshire Economic Poisons Laws (RSA438)*

438:1 Definitions.* For the purposes hereof the following words shall have the following meanings:

I. The term "economic poison" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, fungi, weeds, or other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the commissioner shall declare to be a pest.

II. The term "insecticide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any insects which may be present in any environment whatsoever.

III. The term "fungicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any fungi.

IV. The term "rodenticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating rodents or any other vertebrate animal which the commissioner shall declare to be a pest.

V. The term "herbicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any weed.

VI. The term "insect" means any of the numerous small invertebrate animals generally having the body more or less obviously segmented, for the most part belonging to the class

* Subject to separability clause.

Insecta, comprising six-legged, usually winged forms, as, for example, beetles, bugs, bees, flies, and to other allied classes of arthropods whose members are wingless and usually have more than six legs, as, for example, spiders, mites, ticks, centipedes, and wood lice.

VII. The term "fungi" means all non-chlorophyll-bearing thallophytes (that is, all non-chlorophyll-bearing plants of a lower order than mosses and liverworts) as, for example, rusts, smuts, mildews, molds, yeasts, and bacteria, except those on or in living man or other animals.

VIII. The term "weed" means any plant which grows where not wanted.

IX. The term "ingredient statement" means either—(1) a statement of the name and percentage of each active ingredient, together with the total percentage of the inert ingredients, in the economic poison; or (2) a statement of the name of each active ingredient, together with the name of each and total percentage of the inert ingredients if any there be, in the economic poison (except option 1 shall apply if the preparation is highly toxic to man, determined as provided in section 9 of this chapter); and, in addition to (1) or (2) in case the economic poison contains arsenic in any form, a statement of the percentages of total and water soluble arsenic, each calculated as elemental arsenic.

X. The term "active ingredient" means an ingredient which will prevent, destroy, repel, or mitigate insects, fungi, rodents, weeds, or other pests.

XI. The term "inert ingredient" means an ingredient which is not an active ingredient.

XII. The term "antidote" means the most practical immediate treatment in case of poisoning and includes first aid treatment.

XIII. The term "commissioner" means the commissioner of agriculture.

XIV. The term "label" means the written, printed, or graphic matter on, or attached to, the economic poison, or the immediate container thereof, and the outside container or wrapper of the retail package, if any there be, of the economic poison.

XV. The term "labeling" means all labels and other writ-

ten, printed, or graphic matter (1) upon the economic poison or any of its containers or wrappers; (2) accompanying the economic poison at any time; (3) to which reference is made on the label or in literature accompanying the economic poison, except when accurate, non-misleading reference is made to current official publications of the United States department of agriculture or interior, the United States public health service, state experiment stations, New Hampshire University, or any other similar federal institutions or official agencies of this state or other states authorized by law to conduct research in the field of economic poisons.

XVI. The term "adulterated" shall apply to any economic poison if its strength or purity falls below the professed standard or quality as expressed on labeling or under which it is sold, or if any substance has been substituted wholly or in part for the article, or if any valuable constituent of the article has been wholly or in part abstracted.

XVII. The term "misbranded" shall apply

(1) to any economic poison if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;

(2) to any economic poison

(a) if it is an imitation of or is offered for sale under the name of another economic poison;

(b) if the labeling accompanying it does not contain instructions for use which are necessary and, if complied with, adequate for the protection of the public;

(c) if its labeling bears any reference to registration hereunder;

(d) if the label does not contain a warning or caution statement which may be necessary and, if complied with, adequate to prevent injury to living man and other vertebrate animals;

(e) if the label does not bear an ingredient statement on that part of the immediate container and on the outside container or wrapper, if there be one, through which the ingredient statement on the immediate container can be clearly read, of the retail package which is presented or displayed under customary conditions of purchase;

(f) if any word, statement, or other information required by or under the authority hereof to appear on the labeling is not prominently placed thereon with such conspicuousness as, compared with other words, statements, designs, or graphic matter in the labeling and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use; or

(g) if in the case of an insecticide, rodenticide, fungicide, or herbicide, when used as directed or in accordance with commonly recognized practice, it shall be injurious to living man or other vertebrate animals or vegetation, except weeds, to which it is applied, or to the person applying such economic poison.

SOURCE: 1949, 311:1 par. 1, eff. Jan. 1, 1950.

438:2 Prohibited Acts.*

I. It shall be unlawful for any person to distribute, sell or offer for sale within this state or deliver for transportation or transport in intrastate commerce or between points within this state through any point outside this state any of the following:

(1) Any economic poison which has not been registered pursuant to the provisions of section 3 hereof, or any economic poison if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration, or if the composition of an economic poison differs from its composition as represented in connection with its registration; provided, that in the discretion of the commissioner, a change in the labeling or formula of an economic poison may be made within a registration period without requiring re-registration of the product.

(2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clearly read, a label bearing

(a) the name and address of the manufacturer, registrant, or person for whom manufactured;

* Subject to separability clause

(b) the name, brand, or trade-mark under which said article is sold; and

(c) the net weight or measure of the content subject, however, to such reasonable variations as the commissioner may permit.

(3) Any economic poison which contains any substance in quantities highly toxic to man, determined as provided in section 9 hereof, unless the label shall bear, in addition to any other matter required hereby,

(a) the skull and crossbones;

(b) the word "poison" prominently, in red, on a background of distinctly contrasting color; and

(c) a statement of an antidote for the economic poison.

(4) The economic poisons commonly known as standard lead arsenate, basic lead arsenate, calcium arsenate, magnesium arsenate, zinc arsenate, zinc arsenite, sodium fluoride, sodium fluosilicate, or barium fluosilicate unless they have been distinctly colored or discolored as provided by regulations issued in accordance herewith, or any other white powder economic poison which the commissioner, after investigation of and after public hearing on the necessity for such action for the protection of the public health and the feasibility of such coloration or discoloration, shall, by regulation, require to be distinctly colored or discolored; unless it has been so colored or discolored; provided, that the commissioner may exempt any economic poison to the extent that it is intended for a particular use or uses from the coloring or discoloring required or authorized by this section if he determines that such coloring or discoloring for such use or uses is not necessary for the protection of the public health.

(5) Any economic poison which is adulterated or misbranded.

II. It shall be unlawful for any person to detach, alter, deface or destroy, in whole or in part, any label or labeling provided for herein, or regulations promulgated hereunder; or to add any substance to, or take any substance from, an economic poison in a manner that may defeat the purpose hereof.

111. It shall be unlawful for any person to use for his own advantage or to reveal, other than to the commissioner or proper officials or employees of the state or to the courts of this state in response to a subpoena, or to physicians, or in emergencies to pharmacists and other qualified persons, for use in the preparation of antidotes, any information relative to formulas of products acquired by authority hereof.

SOURCE: 1949, 311:1 par. 2, eff. Jan. 1, 1950.

438:3 Registration.* Every economic poison which is distributed, sold or offered for sale within this state or delivered for transportation or transported in intrastate commerce or between points within this state through any point outside this state shall be registered in the office of the commissioner, and such registration shall be renewed annually; provided, that products which have the same formula, are manufactured by the same person, the labeling of which contains the same claims, and the labels of which bear a designation identifying the product as the same economic poison may be registered as a single economic poison; and additional names and labels shall be added by supplement statements during the current period of registration.

SOURCE: 1949, 311:1 par. 3, eff. Jan. 1, 1950.

438:4 Exception.* Notwithstanding any other provisions hereof, registration is not required in the case of an economic poison shipped from one plant within this state to another plant within this state operated by the same person.

SOURCE: 1949, 311:1 par. 8, eff. Jan. 1, 1950.

438:5—Statement Required.* The registrant shall file with the commissioner a statement including (1) the name and address of the registrant and the name and address of the person whose name will appear on the label, if other than the registrant; (2) the name of the economic poison; (3) a complete copy of the labeling accompanying the economic poison and a statement of all claims to be made for it including directions for use; and (4) if requested by the commissioner a full description of the tests made and the results thereof upon which the claims are based. In the case of renewal of registration, a statement shall be re-

* Subject to separability clause.

quired only with respect to information which is different from that furnished when the economic poison was registered or last re-registered.

SOURCES: 1915, 118:2. PL 185:2. RL 227:2. 1949, 311:1 par. 4, eff. Jan. 1, 1950.

438:6—Fees.* The registrant shall pay an annual fee of ten dollars for each economic poison registered, provided, however, that any registrant may register annually any number of brands upon the payment of an annual fee of one hundred dollars. A sum not to exceed three thousand dollars annually from said fees shall be held in the state treasury in a special fund to be used only for carrying out the provisions hereof. The monies in said special fund shall not lapse but may be used at any time for carrying out the provisions hereof. Any excess above three thousand dollars annually which may be collected from fees under the provision of this section shall be credited to the general funds.

SOURCES: 1915, 118:2. PL 185:2. RL 227:2. 1949, 311:1 par. 5, eff. Jan. 1, 1950.

438:7 Submission of Formula.* The commissioner, whenever he deems it necessary in the administration hereof may require the submission of the complete formula of any economic poison. If it appears to the commissioner that the composition of the article is such as to warrant the proposed claims for it and if the article and its labeling and other material required to be submitted comply with the requirements of section 2 hereof, he shall register the article.

SOURCE: 1949, 311:1 par. 6, eff. Jan. 1, 1950.

438:8 Corrections before Registration.* If it does not appear to the commissioner that the article is such as to warrant the proposed claims for it or if the article and its labeling and other material required to be submitted do not comply with the provisions of this chapter, he shall notify the registrant of the manner in which the article labeling, or other material required to be submitted fail to comply with the chapter so as to afford the registrant an opportunity to make the necessary corrections. If,

* Subject to separability clause

upon receipt of such notice, the registrant insists that such corrections are not necessary and requests in writing that the article be registered, the commissioner shall register the article, under protest, and such registration shall be accompanied by a warning, in writing, to the registrant of the apparent failure of the article to comply with the provisions of the chapter. In order to protect the public, the commissioner, on his own motion, may at any time, cancel the registration of an economic poison and in lieu thereof issue a registration under protest in accordance with the foregoing procedure. In no event shall registration of an article, whether or not protested, be construed as a defense for the commission of any offense prohibited under section 2 of this chapter.

SOURCE: 1949, 311:1 par. 7, eff. Jan. 1, 1950.

438:9 Powers of Commissioner.* The commissioner is authorized, after opportunity for a hearing (1) to declare as a pest any form of plant or animal life or virus which is injurious to plants, men, domestic animals, articles or substances; (2) to determine whether economic poisons are highly toxic to man; and (3) to determine standards of coloring or discoloring for economic poisons, and to subject economic poisons to the requirements of paragraph I (4) of section 2 hereof.

SOURCE: 1949, 311:1 par. 9, eff. Jan. 1, 1950.

438:10 Rules and Regulations.* The commissioner is authorized to make necessary rules and regulations for carrying out the provisions hereof, including rules and regulations providing for the collection and examination of samples of economic poisons.

SOURCE: 1949, 311:1 par. 10, eff. Jan. 1, 1950.

438:11 Adoption of Federal Rules.* In order to avoid confusion endangering the public health, resulting from diverse requirements, particularly as to the labeling and coloring of economic poisons, to avoid increased costs to the people of this state due to the necessity of complying with such diverse requirements in the manufacture and sale of such poisons, and to secure uniformity between the requirements of the several states and the federal government relating to such poisons, the commissioner is authorized, after due public hearing, to adopt by

* Subject to separability clause.

regulation such regulations, applicable to and in conformity with the primary standards established hereby, as have been or may be prescribed in the United States department of agriculture with respect to economic poisons.

SOURCE: 1949, 311:1 par. 11, eff. Jan. 1, 1950.

438:12 Enforcement.* The examination of economic poisons shall be made under the direction of the commissioner for the purpose of determining whether they comply with the requirements hereof. If it shall appear from such examination that an economic poison fails to comply with the provisions hereof, and the commissioner contemplates instituting criminal proceedings against any person, the commissioner shall cause appropriate notice to be given to such person. Any person so notified shall be given an opportunity to present his views, either orally or in writing, with regard to such contemplated proceedings and if thereafter in the opinion of the commissioner it shall appear that the provisions hereof have been violated by such person, then the commissioner shall refer the facts to the county solicitor for the county in which the violation shall have occurred with a copy of the results of the analysis or the examination of such article; provided, however, that nothing herein shall be construed as requiring the commissioner to report for prosecution or for the institution of libel proceedings minor violations hereof whenever he believes that the public interests will be best served by a suitable notice of warning in writing. It shall be the duty of each county solicitor to whom any such violation is reported to cause appropriate proceedings to be instituted and prosecuted without delay.

SOURCE: 1949, 311:1 par. 12, eff. Jan. 1, 1950.

438:13 Exemptions.* The penalties provided for violations of paragraph I of section 2 shall not apply to (1) any carrier while lawfully engaged in transporting an economic poison within this state, if such carrier shall, upon request, permit the commissioner or his designated agent to copy all records showing the transactions in and movement of the articles; (2) public officials of this state and the federal government engaged in the performance of their official duties; (3) the manufacturer or shipper of an

* Subject to separability clause.

economic poison for experimental use only by or under supervision of an agency of this state or of the federal government authorized by law to conduct research in the field of economic poisons, or by others if the economic poison is not sold and if the container thereof is plainly and conspicuously marked "For experimental use only Not to be sold," together with the manufacturer's name and address; provided, however, that if a written permit has been obtained from the commissioner, economic poisons may be sold for experiment purposes subject to such restrictions and conditions as may be set forth in the permit.

SOURCE: 1949, 311:1 par. 13, eff. Jan. 1, 1950.

438:14 Export.* No article shall be deemed in violation hereof when intended solely for export to a foreign country, and when prepared or packed according to the specifications or directions of the purchaser. If not so exported, the provisions shall apply.

SOURCE: 1949, 311:1 par. 14, eff. Jan. 1, 1950.

438:15 Penalties.*

I. Any person violating any of the provisions hereof shall be fined not more than one hundred dollars for the first offense and for a second offense within a period of three years shall be fined not less than one hundred dollars nor more than five hundred dollars.

II. Notwithstanding any other provisions of this section, any person, with intent to defraud, who uses or reveals information relative to formulas of products acquired under authority hereof shall be fined not more than one hundred dollars or imprisoned for not more than one year, or both.

SOURCE: 1949, 311:1 par. 15, eff. Jan. 1, 1950.

438:16 Seizures; Forfeiture.* Any economic poison that is distributed, sold, or offered for sale within this state or delivered for transportation or transported in intrastate commerce or between points within this state through any point outside this state shall be liable to be proceeded against in any court in any county of the state where it may be found and seized for forfeiture as provided by chapter 617, RSA.

(1) if it is adulterated or misbranded;

* Subject to separability clause.

(2) if it has not been registered under the provisions of section 3;

(3) if it fails to bear on its label the information required hereby;

(4) if it is a white powder economic poison and is not colored as required hereunder.

SOURCE: 1949, 311:1 par. 16, eff. Jan. 1, 1950.

438:17 Cooperation.* The commissioner is authorized and empowered to cooperate with, and enter into agreements with, any other agency of this state, the United States department of agriculture, and any other state or agency thereof for the purpose of carrying out the provisions hereof and securing uniformity of regulations.

SOURCE: 1949, 311:1 par. 17, eff. Jan. 1, 1950.

* Subject to separability clause.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 216

NUODEX PRODUCTS CO., INC.,

Petitioner,

vs.

W. H. ELLIOTT & SONS, CO., INC., and
E. & F. KING & CO. INCORPORATED,

Respondents.

Respondent Elliott's Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals for the First Circuit

Submitted by

STANLEY M. BROWN, and

McLANE, CARLETON, GRAF, GREENE & BROWN
40 Stark Street
Manchester, New Hampshire

Attorneys for Respondent Elliott

BRIEF IN OPPOSITION TO PETITION FOR WRIT

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In The

Supreme Court of the United States

October Term, 1956

No. 416

Nuodex Products Co., Inc.,

Petitioner,

vs.

W. H. Elliott & Sons Co., Inc., and E. & F. King & Co., Incorporated,

Respondents.

Respondent Elliott's Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals for the First Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent W. H. Elliott & Sons Co., Inc., prays that the writ of certiorari herein sought by petitioner, Nuodex Products Co., Inc., be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported in 243 F. 2d. 116, and reverses the decision of the Federal District Court for the District of New Hampshire, reported in 144 F. Supp. 401.

JURISDICTION

The decision of the Court of Appeals for the First Circuit was entered March 26, 1957. Review by certiorari is permissible under 28 U. S. C. 1254(1). Petition for writ of certiorari was timely filed on June 22, 1957.

QUESTION PRESENTED

1. Whether the Federal District Court for the District of New Hampshire acquired jurisdiction over a foreign corporation served in accordance with local statute, where the foreign corporation promoted the use of its products in New Hampshire by a sales force, advertising, and service to regular customer accounts over the years; registered the particular product alleged to have caused the damage complained of, as an economic poison under New Hampshire Economic Poisons Law, to make its sale within the state lawful; and solicited sales within the state by a continuous systematic course of business activity in New Hampshire through an independent corporate sales agent; on a complaint seeking to recover the damages caused in New Hampshire to a New Hampshire resident who bought in New Hampshire for use in New Hampshire paint in which the poisonous product had been incorporated by a co-defendant in Massachusetts. The District Court found that the foreign corporation was doing business in the state and that no undue inconvenience would be occasioned to it in defending the suit in the state; but concluded that the Court lacked jurisdiction because the cause was not related to its local activities; the Court of Appeals reversed on the basis that if a relation was necessary, the cause was related to the foreign corporation's activities within the state.

STATEMENT OF THE CASE

This is a diversity complaint against two foreign corporations, seeking to recover damages allegedly sustained when plaintiff Elliott painted commercial rose-growing greenhouses with defendant King's greenhouse paint, in which King had incorpora-

ted Nuodex' mildew inhibitor, "Super-Ad-It". The Nuodex product, "Super-Ad-It", is a mercury compound which vaporizes; roses are susceptible to mercury vapors, and $800,000 damage to the roses is alleged to have resulted.

King, after originally moving to dismiss, waived jurisdiction and filed a cross-complaint against Nuodex. Nuodex moved to dismiss (1) because the complaint failed to state a cause against it, and (2) because it was not subject to the jurisdiction of the Court because not doing business in the state.

The District Court, at Nuodex' request, heard the demurrer first, and denied it. Subsequently, at a hearing on the jurisdictional phase of the motion, King having alleged that Nuodex by submitting the demurrer for decision had waived its jurisdictional ground, both King and Elliott relied on this waiver. Elliott and King introduced evidence on the jurisdictional issue which the Court of Appeals considered sufficient to justify the District Court's findings of fact set forth at 243 F. 2d. 116 at 119-120, which include the following:

> "Nuodex is a manufacturer of special-purpose chemicals and has its usual place of business in New Jersey * * * [I]ts sales in the United States are primarily, although not exclusively, entrusted to seventeen corporate sales representatives whose activities are supervised by six regional Nuodex Sales Managers. In the region which includes New Hampshire, Nuodex' sales representative is D. H. Litter Company . . . a New York corporation . . . * * *. It is an independant corporation, and Nuodex has no financial interest in it or any control over it. Litter's payment from Nuodex is in the form of a five per cent commission, and its soliciting personnel are its own employees . . ."

As the District Court considered the matter, its findings were related to the following *"criteria"* (italics added) suggested by this Court in *International Shoe Co.* v. *Washington*, 326 U. S. 310, 90 L. Ed. 95 (1945):

"*The first criteria* . . . is whether the defendant's activities were systematic and continuous * * * The activities carried on in this state by Litter on behalf of Nuodex were continuous and systematic. Litter's salesman, regularly and systematically, visited various business concerns in New Hampshire, and would attempt to 'sell everything for all companies we represent'" (144 F. Supp. 401 at 405-6, H. N. 6)

* * *

"Once accepting the proposition that solicitation is a commercial activity recognized by New Hampshire as sufficient to constitute 'transacting business' under New Hampshire RSA 300:11(c), we are faced with the problem whether or not the activities of Litter can be attributed to Nuodex. I believe the fact that Litter was a separate and independent corporation and not an 'agent' of Nuodex, in the legal sense, is not a bar to service of process upon Nuodex in New Hampshire. In *Labonte* v. *American Mercury Magazine, Inc., supra* [98 N. H. 163, 96 A. 2d. 200, 38 A. L. R. 2d. 742], the Supreme Court held the defendant, The American Mercury, subject to service of process, even though all of the activities attributed to the defendant in this state were carried on by the Rumford Press, an independent and separate corporation, which was even less under the direction of American Mercury than Litter was under the direction of Nuodex. Nor is it of any significance that Litter worked for several other companies besides Nuodex. Rumford Press printed many magazines other than the American Mercury" (144 F. Supp. 401, 406, H. N. 7, 8).

* * *

"*A second criterion* . . . is to estimate the inconvenience 'which would result to the corporation from a trial away from its *home* or principal place of business'. * * * In the case at bar, there seems to be no basis for holding that it would be a hardship to require Nuodex to defend this suit in New Hampshire. In weighing the equities of this case, it appears that it is not inconvenient to hold trial here." (144 F. Supp. 401, 406, 407, H. N. 10).

* * *

"*A third criterion* . . . is to examine the extent to which the defendant exercised the privilege of conducting activities within New Hampshire, and has enjoyed the benefits and protection of its laws. * * * [T]he defendant did take advantage of the provisions of New Hampshire RSA 438:3, and registered its products so that they might be legally sold in this state, and, as the United States Supreme Court observes, the 'exercise of that privilege may give rise to obligations * * *' *International Shoe Co.* v. *State of Washington* . . . . " (144 F. Supp. 401, 407).

After being satisfied that the above three criteria *were* met, the District Court went on:

"*The fourth criterion* . . . is to examine how far the obligations sued upon arise out of, or are connected with, the activities of the foreign corporation within the State. * * * I am unable to discover any activity in the state which is connected with the injury here complained of. There is no evidence that King purchased Super-Ad-It because of solicitation or advertising in New Hampshire, nor is there any evidence that the plaintiff purchased King's paint because of Nuodex' activities within the state. Therefore I conclude that this fourth 'standard' is not met" (144 F. Supp. 401, 407, H. N. 11, 12).

The District Court, holding that *all four* criteria must be met, dismissed the complaint for failure to meet the fourth criterion or "standard".

On Appeal, the Court of Appeals for the First Circuit reversed the District Court's handling of this "fourth criteria" only, that Court, by Judge Hartigan, stating:

"[W]e believe that such connection is demonstrated by Nuodex' industrial and retail registration of Super Ad-It under the New Hampshire Economic Poison Law, set forth

above, in 1953 and 1954. It seems that without such registration Super Ad-It could not be sold legally in New Hampshire even in a 'mixture of substances', such as King's paint. See N. H. Rev. Stat. Ann. *c.* 438 *s.* 1 (1955). Therefore the damage occasioned by its shipment into New Hampshire by King was connected with and arose from activity by Nuodex in New Hampshire in the sense that if Nuodex had not registered the product, and in the absence of other registration, the product could not have legally entered New Hampshire and the suit would not have arisen. Thus the damage complained of here 'is accounted for only by the defendant's activities in New Hampshire'. *Taylor* v. *Klenzade Products, supra*, 97 N. H. at page 521 and 92 A. 2d. at page 913."

"Moreover, it is vitally significant that Nuodex did much more than merely register its product in New Hampshire, as detailed in the lower court's decision. The District Court found that there was a continuous and systematic course of business activity in the state by Nuodex through Litter. This activity included efforts to increase the sales of Super Ad-It in New Hampshire. Although the sale that resulted in the damage complained of here was made by Litter to King in Massachusetts, the record in addition reveals that retail packages of Super Ad-It were getting into the state either by direct sales or other distribution routes. All of these various methods of distributing the substance in question were part and parcel of Nuodex' over-all sales program" (243 F. 2d. 116 at 121).

Chief Justice Magruder and Judge Woodbury concurred in separate opinions, both of which considered that New Hampshire did not impose any "criteria" except compliance with Federal due process.

This petition for a writ of certiorari followed.

REASONS FOR DENYING CERTIORARI

If this Court recognizes, as it must, that application of the due

process rule of *International Shoe Co.* v. *Washington*, depends upon weighing the facts presented in each case in relation to the fair and orderly administration of law, it would seem that the questions sought to be raised here by petitioner are so patently frivolous as to make the case a fit candidate for dismissal.

Stripped of its verbosity, the petition urges only that the writ issue here because in other cases on other facts, courts have sometimes sustained complaints under the *International Shoe* case doctrine, and have sometimes dismissed them, indicating that the question of "doing business" is provocative of litigation (Petitioner's Brief *p.* 34). There are other plausible explanations of the frequency of motions to dismiss based upon this defense:

> "Defendants have been known to interpose jurisdictional objections without regard to the amount of hardship upon them, or upon the plaintiff if those objections should prevail." 16 U. Chi. L. R. 523 (1949), The Growth of the International Shoe Doctrine, at 530.

Essentially the facts here are:

(1) The cause arose in New Hampshire.
(2) Plaintiff is a New Hampshire resident.
(3) Both defendants were doing business in New Hampshire.
(4) There is no inconvenience on Nuodex in trying the case in the Federal District Court in New Hampshire.

Nuodex, however, says because it sold so few of its products, over the years, directly to New Hampshire accounts, the fact it was trying to sell, and with some limited success, should be disregarded. No questions are raised, however, except the factual issues involved in weighing the significance of the business done, and the inconvenience, if any, of the forum chosen. We respectfully suggest that on these issues this case is clearly controlled by this Court's decision in *Perkins* v. *Benguet Consol Mining Co.*, 342 U.S. 437, 96 L. Ed. 485 (1952), and was properly decided

below on the holding of that case. The petition should be denied.

If, nevertheless, this Court sees fit to grant the petition, and issue the writ, respondent Elliott respectfully suggests that the only novel holding in the case, and one which would have merited review, had it been decisive, may be stated thus:

> Whether invoking the judgment of a Federal District Court on demurrer to a complaint constitutes a waiver of a claim pleaded but not yet heard, that the District Court lacks jurisdiction over the defendant, where both defenses are raised by a single motion to dismiss. The Court of Appeals affirmed the District Court's ruling that no waiver results.

We firmly believe that both the learned District Court and the Court of Appeals erred in the disposition of this issue (144 F. Supp. 401, at 408; 245 F. 2d. 116 at 117-119, 122). The Court of Appeals while noting that none of the authorities cited by the District Court, or cited by counsel, met the problem, cited no further authority on the point. We know of none. Consequently, we suggest that this is a novel point, and wrongly decided.

Respondent Elliott, however, is not desirous that the writ be granted merely to correct this error, in view of the additional delay which would be imposed in arriving at a decision on the merits. If, on the other hand, the Court sees fit to grant the writ, on the petition of Nuodex, respondent Elliott respectfully requests that the issue on waiver likewise be reviewed.

CONCLUSION

We have indicated above why we believe the writ sought herein should be denied. The decision complained of is based on findings fully supported in the record, and on rulings fully supported by both the *International Shoe* case and the *Benguet Consol. Mining Company* case. If certiorari were granted on the whole case, moreover, we believe the same result would obtain after review, since not only does the record fully support the present

decision on jurisdiction, but, in addition, Nuodex waived its reliance on that defense.

Respectfully submitted,

W. H. Elliott & Sons Co., Inc., by

Stanley M. Brown,

McLane, Carleton, Graf, Greene & Brown

40 Stark Street

Manchester, New Hampshire

Attorneys for Respondent Elliott